Office - Supreme Court, U.S.
FILED
OCT 13 1982
ALEXANDER L. STEVAS,
CLERK

82-667

NO

IN THE

Supreme Court of the United States

October Term, 1982

THE STATE OF FLORIDA

Petitioner,

vs.

SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari
to the Florida Third District Court of Appeal

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128
(305) 377-5441

QUESTIONS PRESENTED

1. WHETHER THE DECISION OF THE FLORIDA COURT LIMITING THE AUTHORITY OF THE UNITED STATES CONGRESS AND CONSTRUING THE UNITED STATES CONSTITUTION, HOLDING THAT UNDER 19 U.S.C. §1581(a) UNITED STATES CUSTOMS OFFICERS MAY NOT BOARD A VESSEL IN CUSTOMS WATERS FOR A ROUTINE DOCUMENT EXAMINATION WITHOUT REASONABLE SUSPICION OR PROBABLE CAUSE, IS IN DIRECT DEROGATION OF THIS COURT'S CONSTITUTIONAL ANALYSIS OF SEARCHES IN PROXIMITY TO A BORDER AND IS IN DIRECT CONFLICT WITH THE HIGHEST FEDERAL COURT IN THE SAME JURISDICTION IN UNITED STATES v. ALFREY, 620 F.2d (5th Cir. 1980) HOLDING THAT UNDER 19 U.S.C. §1581(a) UNITED STATES CUSTOMS OFFICERS NEED NEITHER REASONABLE SUSPICION NOR PROBABLE CAUSE TO BOARD A VESSEL IN CUSTOM'S WATERS FOR A ROUTINE DOCUMENT EXAMINATION.

2. WHETHER THE TRIAL DISTRICT COURT'S FLAT REJECTION OF THE STATE'S CUSTOMS DRUG SMUGGLER PROFILE PRESENTATION REASONABLE SUSPICION ANALYSIS IS IN DIRECT CONFLICT WITH UNITED STATES v. MENDENHALL, 446 U.S. 544 (1980) AND UNITED STATES v. CORTEZ, 449 U.S. 411 (1981) AND IS AN ERRONEOUS CONSTRUCTION OF THE UNITED STATES CONSTITUTION.

3. WHETHER THE EXCLUSIONARY RULE SHOULD BE APPLIED TO NON-EGREGIOUS POLICE CONDUCT. SEE, MICHIGAN v. DEFILLIPPO, 443 U.S. 31 (1979), SEE, ALSO, UNITED STATES v. WILLIAMS, 622 F.2d 830, at 840-847 (5th Cir. 1980) (en banc), cert. den., 449 U.S. 1127 (1981).

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.	i-ia
TABLE OF CITATIONS.	ii-v
PREFACE	vi
OPINIONS BELOW.	1
JURISDICTION.	2-3
CONSTITUTIONAL STATUTORY PROVISIONS.	4-5
STATEMENT OF THE CASE	6-9
SUMMARY OF ARGUMENT	10-14
ARGUMENT.	15-29
CONCLUSION.	30-32

TABLE OF CITATIONS

UNITED STATES CASES	PAGE
Carroll v. United States, 267 U.S. 132 (1925).	17,23 24
Chambers v. Maroney, 399 U.S. 42 (1970)	23
Texas v. White, 423 U.S. 67 (1975)	23
United States v. Cortez, 449 U.S. 411 (1981).	i,12,22 23
United States v. Mendenhall, 446 U.S. 544 (1980)	i,12,22 23
United States v. Ramsey, 431 U.S. 606 (1977).	17

TABLE OF CITATIONS

CASES	PAGE
Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981) . .	11,20
Casal v. State, 375 So.2d 1077 (Fla. 3d DCA 1979).	10,12 24,25
Hetland v. State, 366 So.2d 831 (Fla. 2d DCA 1979) .	2
Hetland v. State, 387 So.2d 963 (Fla. 1980)	3
Morales v. State, 407 So.2d 321 (Fla. 3d DCA 1981) .	10,21
State v. Doyle, 409 So.2d 1168 (Fla. 3d DCA 1982).	10,21
State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976) .	10,21
State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982) .	1,3,8
United States v. Adams, 569 F.2d 924 (5th Cir. 1978) . . .	14
United States v. Alfrey, 620 F.2d (5th Cir. 1980)	i,11,18 20,21 27
United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980) . . .	16

TABLE OF CITATIONS

CASES	PAGE
United States v. Forbicetta, 484 F.2d 645 (5th Cir. 1973) . . .	22
United States v. Freeman, 579 F.2d 942 (5th Cir. 1979) . . .	11,16 19,20, 27
United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968).	16
United States v. Ivey, 546 F.2d 139 (5th Cir. 1977) . . .	14
United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981). . .	16
United States v. Williams, 617 F.2d 1063 (5th Cir. 1980). . .	15,17 18

TABLE OF CITATIONS

OTHER AUTHORITIES	PAGE
Amendment IV, U. S. Constitution . . .	4
Amendment XIV, U.S. Constitution . . .	4
First Congress Act of July 31, 1789, Ch.5, 1 Stat. 29 (1789).	17
Title 19, United States Code §1401(j).	17
Title 19, United States Code §1581(a).	i,2,5,8 11,14 15,17 18,19 21,25 27
Title 19, United States Code §1582 . .	14
Title 21, United States Code §955. . .	15
Title 28, United States Code §1257(3).	2

PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Petitioner in the Supreme Court of Florida; the Appellant in the District Court of Appeal of Florida, Third District and the prosecution in the Florida trial court. The Respondent, SILVIO P. ZAFRA, was the Respondent in the Supreme Court of Florida; the Appellee in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix and consist of pages A1-A30.

I.

OPINIONS BELOW

The opinion of the District Court of Florida, Third District affirming the Florida trial court's granting of the Defendant's Motion to Suppress is reported at State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982). The opinion of the Florida Supreme Court denying the State's Application for review , is contained in the Petitioner's Appendix at "A2" and will be reported by the West Publishing Company. The West Publishing Company citation is the official reporter for citation to these opinions.

II.

JURISDICTION

On July 15, 1982, the Supreme Court of Florida denied the State's timely application for review. A2. On September 13, 1982, this Honorable Court (by Justice Powell) extended the time for filing the present petition up to and including October 13, 1982. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3); Title 19, United States Code §1581(a); and Amendments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. Hetland v. State, 366 So.2d 831 (Fla. 2d DCA 1979) approved and adopted, Hetland v.

State, 387 So.2d 963 (Fla. 1980). The constitutional issues herein were presented and fully argued at all levels of the proceedings below. See, State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982); A25-A30.

The second issue in the present cause regarding the use of a drug smuggler's "profile" is pending on the merits before this Court in Florida v. Royer, U.S.Sup.Ct. Case No. 80-2146. The issues of the authority of law enforcement officers to conduct routine document and inspections of watercraft in the present case is pending on the merits in Florida v. Casals, U.S.Sup.Ct. Case No. 81-2318, cert. granted October 4, 1982.

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provided that:

> "All persons born naturalized in the United States,and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 19 United States Code §1581(a) provides specifically that:

> "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he amy be authorized, within a customs enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within its district, and examine the manifest and other documents and papers and examine, any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

IV.

STATEMENT OF THE CASE

The Defendant, Silvio P. Zafra, was charged by information with three counts consisting of one count of trafficking in marijuana, arising out of his attempt on October 10, 1980 to bring ashore one thousand (1000) pounds of marijuana in a twenty five (25) foot speedboat. The Defendant filed a motion to suppress, which the Florida trial court granted after a hearing.

At the hearing below the State produced three witnesses. The Defendant did not testify and produced no witnesses or evidence. United States Customs Officer Richard Ogden said that he had been trained by the Customs Service to intercept contraband coming into the United States by plane and boat. A10. On October 10, 1980 he went duty at six p.m. and began a

routine survey of boats in the Crandon boat ramp area. A12 .

The customs officers at 3:00 o'clock a.m. encountered the Defendant's boat in customs waters. A25. It was undisputed below that the customs officer thereupon decided to conduct a routine customs boarding. A15. Officer Nassosis checked the boat's papers. A24. Officer Ogden stepped onto the trailer fender and looked into the boat. A15. The deck was much higher than the manufacturer had put in. A15. Ogden said that this was a characteristic profile of smugglers. A16. The trend among smugglers had evolved from throwing contraband into cabins to stowing contraband in hidden compartments. A16. Odgen testified that he observed marijuana residue on the boat carpet. A17. There was also a rise in the carpet evidently covering a hatch area. A17. Odgen testified that he considered this suspicious--

the way the vessel was constructed there should not have been a hatch of that nature under the carpet tacked to the deck. A18. The boat had no fishing gear and only tools and mechanics tools on the deck. A18. Odgen said he pulled the carpet back and an odor of marijuana was coming out. A21. The hatch was secured by screws. A21. In the hatch were twelve (12) bales of marijuana weighing one thousand pounds. A22. The other custom's officers testimony was similar.

Upon the foregoing the prosecutor argued in part that the present custom's boarding was proper under 19 U.S.C. §1581(a) even if neither reasonable suspicion nor probable cause was present. See, State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982); A23. The Florida trial court suppressed the evidence holding that there was no reasonable suspicion or probable cause for the seizure. Id.

On Appeal to the Third District Court of Appeal the District Court affirmed the trial court, holding that customs officers cannot conduct routine customs boarding to check papers without reasonable suspicion or probable cause, to wit:

> "We join the trial court in rejecting the state's position that the apparently unrestricted authority conferred by the terms of 19 U.S.C. §1581(a) is not limited by the reasonableness requirement of the fourth amendment and that a customs officer may therefore make an investigative stop and subsequent search of the vessel in inland waters even though there is neither (a) evidence of a boarder crossing or its functional equivalent, nor (b) prior reasonable suspicion of illegal activity." [Emphasis added; footnotes omitted].

On July 15, 1982, the Florida Supreme Court denied the State's timely Petition for Review. A2. On September 13, 1982 this Honorable Court extended the time for filing the present petition up to and including October 13, 1982.

V

SUMMARY OF ARGUMENT

The present cause presents a constitutional crisis, which only this Court can resolve. The Florida Third District Court of Appeal in Miami, Florida, which is the leading and controlling Florida state court[1] for analysis of federal and state "boat law," see, e.g., Casal v. State, 375 So.2d 1077 (Fla. 3d DCA 1979), affirmed in part, 410 So.2d 152 (Fla. 1982), cert. granted, Florida v. Casal, U.S. Sup.Ct. Case No. 81-2318, opinion filed October 4, 1982; State v. Doyle, 409 So.2d 1168 (Fla. 3d DCA 1982); Morales v. State, 407 So.2d 321 (Fla. 3d DCA 1981), has reached a directly

[1]All Florida trial courts are bound by the present decision of the Florida Third District Court. See, State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976). Moreover with the present joint federal and state task force on narcotics traffick centered in Miami and Florida, the impact of the present decision cannot be gainsaid.

contrary result upon the authority of federal officers under a federal statute, than has the highest federal court in the same jurisdiction[2] in United States v. Alfrey, 620 F.2d 551 (5th Cir. 1980) and United States v. Freeman, 579 F.2d 942 (5th Cir. 1979). In sum, the Florida Third District Court of Appeal has told the United States Congress that it cannot do in Florida that which the face of 19 U.S.C. §1581(a) clearly states Congress intended to do: to give customs officers authority in "customs waters" to board vessels for document and customs examination, irrespective of reasonable suspicion or probable cause.

The Florida trial court's rejection and the Florida Third District Court's absolute

[2]All decisions of the United States Fifth Circuit Court of Appeals issued prior to September 30, 1981 are binding upon the present Eleventh Circuit Court of Appeals. Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981)(en banc).

refusal to accept the State's argument upon the aspect of reasonable suspicion as predicated upon a customs profile of drug smugglers and the experience, training and observations of the customs officers, is in direct conflict with the proper constitutional analysis in United States v. Mendenhall, 446 U.S. 544 (1980) and United States v. Cortez, 449 U.S. 411 (1981). The State specially argued below the application of the Carroll doctrine. See, A27- A28; A25-A26. The Florida District Court's erroneous analysis of "profiles;" the experience of law enforcement officers and reasonable suspicion herein is a continuation and extension of the error by the same court presently pending on the merits before this Court in Florida v. Royer, U.S. Sup.Ct. Case No. 80-2146. Additionally on October 4, 1982, this Court accepted jurisdiction in Florida v. Casal, U.S.Sup.Ct. Case No. 81-2318, which

involves state marine patrol officers and their authority under a state statute, together with an application of the Carroll doctrine which are the same issues herein with respect to federal officers under a federal statute.

The present case is therefore a significant case relating directly to pending cases in Casal and Royer, which would serve as a substantial basis for this Court's analysis of an area of critical importance to both the proper analysis of the Criminal law and the security and safety of the citizens of the nation. The matter of the extent of the authority of federal officers under a federal statute as it occurs in the interdiction of drug traffic is of crucial importance to both Florida and the nation. This Court therefore has jurisdiction herein and should exercise it.

Finally the approach, document examination and search herein was conducted by the officers in the good faith belief, that their actions were lawful under 19 U.S.C. §1581(a) and that the observed facts together with their experience and training amounted to reasonable suspicion and probable cause. See, Michigan v. DeFillippo, 443 U. 31 (1979); United States v. Williams, 622 F.2d 830 (5th Cir. 1980)(en banc), cert. den., 449 U.S. 1127 (1981). The harsh result of the exclusionary rule should not therefore be applied to non-egregious conduct.

VI

ARGUMENT

The State stipulated below that this was not a customs "border" search under 19 U.S.C. §1582, but was a customs search under the companion section, 19 U.S.C. §1581(a). A border search by customs under 19 U.S.C. §1582 traditionally requires some degree of proof by the prosecution that the vessel, vehicle, aircraft or person has crossed a border. See, e.g., United States v. Ivey, 546 F.2d 139 (5th Cir. 1977), cert. den. 431 U.S. 943, 97 S.Ct. 2662, 53 L.Ed.2d 263 (1977)(mere nexus); United States v. Adams, 569 F.2d 924 (5th Cir. 1978)(mere proof of nexus to border is sufficient). The prosecutor herein for whatever reason, did not argue that the matter was a border search. But see, United States v. Ivey; United States v. Adams, supra.

Through the enactment of 19 U.S.C. §1581(a) Congress has also authorized customs officers to stop and search vessels in customs waters, to stem the importation of contraband or undeclared merchandise to wit:

> "Any officer of the customs may at any time go on board any vessel or vehicle at any place in the United States or within the customs waters. . .and exmine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

See, United States v. Williams, 617 F.2d 1063 (5th Cir. 1980)(en banc). Concurrent with 19 U.S.C. §1581(a) Congress has also provided customs officers with authority to stem the importation of narcotics, in 21 U.S.C. §955, which provides that it is:

> "unlawful for any person to bring or possess on board any vessel. . .arriving in or departing from the United States or the customs territory of the United States, a controlled substance. . ." [Emphasis added].

See, United States v. Espinosa-Cerpa, 630 F.2d 328, at 334 (5th Cir. 1980). These statutes have been broadly construed with respect to the statutory powers of customs officials. See, United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. den. 393 U.S. 1121, (1969). The Supreme Court has only limited the historical right of the sovereign to control its borders to proximity to the border. Warrantless searches in customs territory are deemed reasonable within the meaning of the Fourth Amendment by virtue of the fact that they occur at the border. See, United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981); United States v. Freeman, 579 F.2d 942 (5th Cir. 1978); approved

in, United States v. Williams, 617 F.3d 1063, at 1081 (5th Cir. 1980)(en banc); see also, United States v. Ramsey, 431 U.S. 606 (1977); Carroll v. United States, 267 U.S. 132 (1925); First Congress Act of July 31, 1789, Ch.5, 1 Stat. 29 (1789). As the Third District Court conceded, the authority of customs officers under 19 U.S.C. §1581(a) in customs waters in indeed, plainly on the face of the statute not limited by traditional Fourth Amendment analysis. See, A5.

In the case at bar, and for all purposes, "customs waters" are defined in 19 U.S.C. 1401(j) as, "the waters within four leagues [12 nautical miles] of the coast of the United States." Within such a definition for purposes of international law, the area from the coast to three (3) nautical miles is also known as "territorial sea" and the area from three (3) nautical miles to twelve (12) nautical miles is

also known as the "contiguous zone." See, United States v. Williams, 617 F.2d at 1073, n.6.

In the case at bar, it is undisputed that the vessel, which was searched was encountered by the Customs officer's herein in customs waters. A14; A25 (prosecutor argument). Under 19 U.S.C. §1581(a) the customs officers herein were not required to have either reasonable suspicion nor probable cause for a detention or search. See, United States v. Alfrey, 620 F.2d 551 (5th Cir. 1980); United States v. Freeman, 579 F.2d 942 (5th Cir. 1979), approved, United States v. Williams, 617 F.2d 1063 at 1081 (5th Cir. 1980)(en banc). In Alfrey, supra, the court held specifically that:

> [T]he recent decision of this Court in United States v. Whitaker, 592 F.2d 826 (5th Cir. 1979), rehearing en banc denied, 601 F.2d 586, cert. denied, 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320, clearly holds that

> United States Customs Officers have authority under 19 U.S.C. §1581(a) to stop and board vessels initially cited in customs waters for document check even in the absence of a modicum of suspicion or probable cause. See also United States v. Freeman, 579 F.2d 942, 945 (5th Cir. 1978). This intepretation of section 1581(a) does not offend the Fourth Amendment. Whitaker, supra, 591 F.2d at 829; Freeman, supra, 579 F.2d at 946." [Emphasis added].

Similarly in Freeman, the customs officers encountered, a sailboat within the three mile limit with no indication whatsoever that it had crossed any border. The Freeman Court noted that there was no warrant, no probable cause for a warrant and no reasonable suspicion to stop the vessel, 579 F.2d at 945. However, the court upheld the warrantless search of the vessel pursuant to the express language in 19 U.S.C. §1581(a) explaining that:

> "[T]he authority embodied within §1581 may be traced back to the commencement of the Republic when the First Congress statutorily granted Customs officials broad powers. The historical significance of the enactment of such Customs statutes by the same Congress which proposed the Fourth Amendment has been recognized by the Supreme Court. Clearly, members of the First Congress regarded neither seizures nor searches of the kind authorized by §1581 'unreasonable' or embraced by the prohibition of the Fourth Amendment." [Emphasis added].

Id. at 946-947.

Both Alfrey and Freeman are binding law for the present federal jurisdiction. See, Bonner v. Pritchard, supra, at n.2.

In the case at bar, it was undisputed that after observing the circumstances, the Customs officers decided to conduct a routine boarding (A15) and that Officer Nasossis checked the vessel's papers (A24). Under the express

authority of §1581 and the foregoing federal substantive law, the initial detention and search herein was without constitutional defect. The District Court's holding that under 19 U.S.C. §1581(a) that the federal officers must show reasonableness under the Fourth Amendment cannot be reconciled and is in direct conflict with the interpretation of the United States Constitution in United States v. Alfrey and United States v. Freeman, supra. The present conflict presents a grave constitutional crisis between the highest federal appellate court having jurisdiction in Florida and the Florida Third District Court of Appeal which is the leading court for the interpretation of 19 U.S.C. §1581(a) and "boat law" in Florida. See, Florida v. Casals; State v. Doyle; Morales v. State, supra. Furthermore all Florida trial courts are bound by the present decisions. State v. Hayes, supra, at n1.

Furthermore, the State would note that the federal officers did indeed have reasonable suspicion, based upon both their experience with smugglers and their observations, to board the vessel. See, United States v. Cortez, __ U.S.___, 101 S.Ct. 690 (1981); see, also, United States v. Mendenhall, ___U.S.___, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)(approving use of profile characterisics); United States v. Forbicetta, 484 F.2d 645, 646 (5th Cir. 1973)(approving use of "profile" characteristics at border search). In Cortez the Court repeated its approval of an officer's use of his experience for probable cause and articulable suspicion thus:

> "The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various

> objective observations, information form police reports, if such are aailable, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained perrson." [Emphasis added]. 101 S.Ct. at 695.

Additionally, after the officers were on the vessel, they certainly acquired probable cause to search the hold from the presence and smell of marijuana on the deck. When the officers so clearly had probable cause to search the hold, the warrantless search was obviously justified by the exigency exception for vehicles and boats. See, Carroll v. United States, 267 U.S. 132 (1925); See also, Texas v. White, 423 U.S. 67 (1975); Chambers v. Maroney, 399 U.S. 42 (1970).

The Florida District Court's and the trial court's flat rejection of the States argument

upon articulable suspicion which was based upon the customs "profile" and the observations, training and experience of the officers, is patently erroneous in the face of the correct constitutional analysis in Mendenhall and Cortez. The fact that the events transpired in the proximity of a border is additionally a fact, which the Florida courts erroneously absolutely refused to credit. See, Cortez. The Florida District Court's erroneous analysis of "profiles" reasonable suspicion and "boat" law is a direct continuation and extension of the same erroneous analysis presently on review upon the merits in Florida v. Royer, U.S. Sup.Ct. Case No. 80-2146 and Florida v. Casal, U.S. Sup.Ct. Case No. 81-2318, cert. granted, October 4, 1982. Casal involves a state statute authorizing document and safety checks by state marine officers and the application of

the Carroll doctrine to that event. The present cause involves precisely the same authority and the Carroll doctrine in the context of a special federal statute and federal officers. This Court has never written a definitive "boat" case opinion or explained the parameters of 19 U.S.C. §1581(a). The State submits that the extraordinary federal and state interest in resolving these issues is cogently and timely presented by the present cause and Casal. Florida with the presense of a massive federal and state joint task force on narcotics traffick; the greatest coast line and the most geographic vulnerability to drug traffic, is the ideal situs for consideration of these issues. Certainly, the nation's stake in Florida as a recognized corridor of drug traffic is paramount. See, SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, 95th CONG. 2D SESS., REPORT ON PROBLEMS OF LAW ENFORCEMENT

AND ITS EFFORT TO REDUCE THE LEVEL OF DRUG TRAFFICKING IN SOUTH FLORIDA. (Comm. Print 1978). This Court should also exercise its jurisdiction herein in the context of Florida v. Royer, and the Florida Third District's absolute rejection of any "profile" analysis and refusal to credit the experience and training of federal and state officers and the proximity of the present transaction to the nation's border, in its analysis. The issue of the profile and reasonable suspicion for these highly trained officers was raised at all levels below. See, A25-A30.

Finally, the State submits that the cause herein is in direct contravention to the good faith analysis of this Court in Michigan v. DeFillippo, 443 U.S. 31 (1979) where despite the unconstitutional nature of the statute this Court nevertheless sustained the seizure where the officers were relying in good faith upon

the statute and its validity. The relationship of DeFillippo to the present circumstance is direct. The federal officers herein were relying upon 19 U.S.C. §1581(a) and that, which even the Florida District Court admits that the statute plainly says the officers can do: board any vessel in customs waters for document and customs inspection. For Florida and all federal customs officers in state court, the present ruling squarely conflicts with Michigan v. DeFillippo. Moreover, the officer's good faith reliance upon their observations, training and experience to conclude that a detention was necessary, presents a circumstance herein of plainly non-egregious police conduct, to which the harsh penalty of the exclusionary rule should find no application. See, California v. Minjares, 443 U.S. 916 (1981)(Rehnquist, J. and Burger, J., dissenting); Stone v. Powell, 428 U.S. 465, at

496-502 (1976)(Burger, J., concurring); Id, at 537-542 (White, J., dissenting); Brewer v. Williams, 430 U.S. 419, at 420-429 (1977)(Burger, J. dissenting; Brown v. Illinois, 422 U.S. 590, at 610-612 (Powell, J. concurring); United States v. Williams, 622 F.2d 830 (5th Cir. 1980)(en banc), cert. den., 449 U.S. 1127 (1981).

VII

CONCLUSION

The Florida Third District Court of Appeal's holding that under 19 U.S.C. §1581(a) that the State must show reasonableness under the Fourth Amendment cannot be reconciled and is in direct conflict with the proper interpretation of the United States Constitution and §1581(a) in, United States v. Alfrey, and United States v. Freeman, supra. At the same time, the decision of the Florida Third District Court is binding on all Florida trial courts and emanates from the leading Florida state court in the construction and analysis of "boat" law and drug courier case law. The present matter is plainly governed by the federal law and the federal interest in maintaining the integrity of the borders and "customs waters" of the United States. This Court should take jurisdiction of the present matter. Florida

has the greatest coastline of any state and a grave interest in the consistent interpretation of "boat law." The inconsistent and erroneous analysis of the Florida District Court presents a conflict on a matter of substantial public and national importance, warranting the exercise of this Court's jurisdiction. The present decision's direct effect upon a national federal and state effort in Florida to stem the tide of drug traffic manifestly supports the propriety of the exercise of this Court's jurisdiction. The present cause presents a most cogent and timely companion Case on the question of federal officer's authority under federal statutes together with the issue of a state officer's authority and the Carroll doctrine in Florida v. Casal, cert. granted, October 4, 1982. Finally, the extraordinary penalty of the exclusionary rule should not be applied, to the federal officer's

good faith reliance upon the plain language of the statute and where their actions are non-egregious.

RESPECTFULLY SUBMITTED on this ____ day of October, 1982, at Tallahassee, Leon County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General

APPENDIX

CONTENTS

PAGE

Opinion, Supreme
Court of Florida. A2-A3

Opinion Florida
Third District
Court of Appeal. A4-A7

EXCERPTS: Hearing
On Motion to Suppress. A8-24

EXCERPT: Argument of Prosecutor. A25-A26

EXCERPT: State's Brief on Appeal. A27-A30

SUPREME COURT OF FLORIDA
THURSDAY, JULY 15, 1982

STATE OF FLORIDA, :

Petitioner, :

vs. : CASE NO. 61,844
District Court of
Appeal 3d District

SILVIO P. ZAFRA, : Case No. 81-474

Respondent. :

This cause having herefore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Consittution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330 (d).

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, and McDONALD, JJ., Concur

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. James R. Jorgenson, Judge
Hon. Richard P. Brinker, Clerk

Calvin L. Fox, Esquire
Paul Morris, Esquire
William A. Clay, Esquire

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1982

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 81-474
SILVIO P. ZAFRA,	**	
Appellee.	**	

Opinion filed January 12, 1982.

An Appeal from the Circuit Court for Dade County, James R. Jorgenson, Judge.

Jim Smith, Attorney General, for appellant.

Paul Morris; Rosen,Portela, Bronis, Angueira & Clay and William A. Clay, for appellee.

Before HUBBART, C.J. and BARKDULL AND SCHWARTZ, JJ.

Schwartz, Judge. A5

We join the trial court in rejecting the state's position that the apparently unrestricted authority conferred by the terms of 19 U.S.C. §1581 (a) [1] is not limited by the reasonableness requirement of the fourth amendment and that a customs officer may therefore make an investigation

---

1. §1581. Boarding vessels

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enformecemt area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

stop and subsequent search of a vessel in inland waters [2] even though there is neither (a) evidence of a border crossing or its functional equivalent, [3] nor (b) prior reasonable suspicion of illegal activity. It is clear that this contention is incorrect and that, under the stated circumstances, such activity is not constitutionally permissible. United States v. Villamonte-Marquez, 652 F.2d 481, 484 (5th Cir. 1981); United States v. Guillen-Linares, 643 F.2d 1054 (5th Cir. 1981); United States v. D'Antignac, 628 F.2d 428, 432-33 (5th Cir. 1980), cert. denied,

---

2. Compare United States v. Freeman, 579 2d 942 (5th Cir. 1978) (stop and boarding on open waters for document check; subsequent search based on probable cause discovered thereafter); Morales v. State, ____ So.2d____(Fla. 3d DCA Case nos. 80-248, 80-249, opinion filed, December 15, 1981).

3. Compare United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981); State v. Smith, 399 So.2d 22 (Fla. 3d DCA 1981).

____U.S.____, 101 S.Ct. 1485, 67 L.Ed.2d 617 (1981); Morales v. State, ____So.2d _____(Fla. 3d DCA Case nos. 80-248, 80-249, opinion filed, December 15, 1981) (dictum); Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974); see, United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). In the posture in which the case was presented and decided below, we need and do go no further in determining the outcome of this appeal.

Affirmed.

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA
CRIMINAL DIVISION

THE STATE OF FLORIDA)
Plaintiff,)
vs.) No. 80-19386
SILVIO ZAFRA,)
Defendant.)
- - - - - - - - - - - -X

Metropolitian Justice
Building,
Miami, Florida,
Friday, 9:00 a.m.,
February 20, 1981.

— — —

The above-entitled case came on for motions before The Honorable James R. Jorgenson, Circuit Judge, pursuant to Notice.

— — —

APPEARANCES:

JANET RENO, State Attorney, by
ELYSE TARG, Assistant State Attorney,
Attorney for Plaintiff.

ROSEN, PORTELA, BRONIS, ANGUEIRA, &
CLAY, by WILLIAM A. CLAY, Esq. of
counsel.
Attorneys for Defendant.

[EXCERPT OF TESTIMONY]

RICHARD D. OGDEN was called as a witness and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TARG:

Q Would you please state your name and official capacity for the record.

A Richard D. Ogden. I am a patrol officer for the United States Customs Service.

Q How long have you been so employed as a Customs Patrol Officer?

A For approximately eighteen months.

Q Pursuant to that job, did you have any training?

A Yes, ma'am, I did.

Q What training was that?

A I attended a seven week integrated law enforcement course of the

Federal Enforcement Center in Glencoe, Georgia. In addition, I attended a four and a half week course at the same location, which dealt with specific duties assigned to Customs Patrol Officers.

Q Officer, what are the duties of a Customs Patrol Officer--and, for the record, I will use a CPO.

What are the duties of a CPO?

A To intercept the flow of contraband coming into the United States, primarily narcotics, and to enforce other customs and related laws.

Q Are your powers basically dealing with boats, airplanes or what?

A Yes, ma'am.

A high percentage of our work deals with boats and aircraft coming into the country.

Q Were you employed on August 10, 1980?

A Yes, ma'am.

Q Were you employed as a CPO then?

A Yes, ma'am.

Q Did you come on to duty that day?

A I came--reported for duty at 6:00 p.m. on October 9.

Q What were you going to do that night?

A Generally that night we conducted a routine servey--myself and my partners --of the public boat ramps situated in the local Miami area going from Key Biscayne up to Bakers Haulover and making an analysis on the different types of trucks and boat trailers parked at these locations.

Q How many boat ramps did you investigate that night, approximately?

A Approximately eight.

Q At any of these ramps did you notice anything unusual or was anything brought to your attention?

A Yes, ma'am.

Q What was that?

A At Crandon Boat Ramp, I would estimate at approximately eight to nine p.m. that evening, we observed two pick-up trucks with trailers attached which attracted our attention.

Q Why did they attract your attention?

A Based on my prior experience as well as the documented experience of all the other officers in our office, this particular trailer, which was a three axle float on, fit somewhat of a profile commonly used in smuggling activities.

Q Why did this seem suspicious? What was it about this type of trailer which seemed suspicious?

A That this particular type of trailer has the capability of carrying a very large vessel as opposed to what

would be used just for fishing around the bay.

* * *

Q Opportunity when was the next time you saw somebody approach that trailer?

A The first and only time we saw someone approach that trailer was when one of two persons boarded the 25 foot Bertram, which arrived at Crandon Marina.

Q What time was that, approximately?

A I believe that was a little after three o'clock in the morning.

Q Was that on October 10?

A Yes, ma'am.

Q Was the length of time between which you had first seen it and the fact that it was three o'clock--did that affect you in any way?

[Objection overruled].

A Yes, ma'am.

Q How so?

A From the time we first spotted the truck and trailer until the time someone approached it, it was nearly seven hours.

That, to me, aroused my suspicions in that it would have been an unusually long fishing trip, in my opinion.

Q Would it have any other influence on you, as to the length of time?

A Yes, ma'am.

We have made notes in our office and calculated on several occasions that it generally takes vessels approximately four and a half to five hours to go from here to any of the islands in the Bimini area and to return. This affected my thinking in that they had more than sufficient time to go to any of the islands, which could be used as a stash site--and there are intelligence bulletins that we have with indicate that that is a common method--store the marijuana on a vessel and return.

Q Did you have occasion to see anybody on the boat?

A Yes, ma'am.

Q Who was that?

A The defendant, Mr. Silvio Zafra, and one other individual.

* * *

Q Officer Ogden, was there anything else about the appearance of these two Latin males which you found to be suspicious?

A Yes ma'am.

Q What was that?

A On the initial glance at the two individuals they appeared to be somewhat--excuse the term--weatherbeaten. They looked like they had been out for some time engaging in perhaps heavy work or something.

Their clothes were somewhat dirty. They just looked like they had really been worked over.

Q Did there come a time when you stopped the two individuals?

A Yes, ma'am.

Q When was that?

A A few minutes after we first stopped the boat coming up to the dock.

Q What was the purpose of the stop?

A. The purpose of the stop was to conduct a routine Customs boarding.

Q Pursuant to that, what did you do?

A My two partners went up to talk to the individuals and to obtain the necessary registration forms. I went to the vessel, which was already aboard the three axle float-on trailer and had already been pulled out of the water. I stepped on the fender above the wheels of the trailer and looked over the gunwale of the vessel into the boat.

Q At that time did you notice anything unusual about that boat?

A Yes, ma'am.

Q What was that?

A I noticed that the main deck of the vessel was considerably higher than what I would believe the manufacturer would have put it. This is also a

profile which has become quite common among smugglers.

The trends have changed over the years. They have gone from just throwing it into the cabin and loading it in remote spots along the coast to using secret compartments and bringing it on to the public boat ramps.

Q Have you ever encountered boats like this in your experience?

A Yes.

Q Have you encountered contraband in these boats?

A Yes, ma'am.

Q How many seizures have you made in boats of this type?

A I would approximately maybe fifteen.

Q What did you do next?

A I climbed aboard the vessel, took a quick glance into the cabin area to assure myself that there was no other

persons on board the cabin, and it was more or less a visual--just a quick visual check.

I looked down at the deck and got down on my hands and knees where I could get a closer look at it.

I had one flashlight and I did observe marijuana residue embedded in the carpet.

You could not see it until you got down on your hands and knees and looked really close and spread the pieces of carpet, you know, apart.

Q Did you find anything else?

A Yes, ma'am.

Prior to finding the residue, I did run my hand over the carpet itself in an effort to determine if I could feel anything underneath and I did feel what appeared to be a small rise underneath the carpet.

Due to its shape and size it led me to believe that there was a hatch underneath the carpet.

Q This was covered by the carpet though?

A That is correct.

Q In your experience, was that suspicious?

A Yes, ma'am, it was.

Q Why?

A Because, the way the vessel was constructed, there shouldn't have been a hatch of that nature under carpet tacked down to the deck.

Q Was there anything else about what you saw on the deck of that boat which made you suspicious?

A Yes, ma'am. There were several tools and a lot of odds and ends on the deck that really had nothing to do with any fishing expedition, as far as I could tell--the tool boxes, odds and ends, mechanics' tools and things that I, ordinarily, would not expect to see on a boat, especially for a fishing expedition.

To the best of my recollection, there was no fishing gear on board the boat. I believe there might have been an ice chest, but I didn't see any fish nor did I see any bait.

Certainly anyone engaging in a fishing trip for six or seven hours would, in my opinion, at least come back with something.

Q What led you to believe that these people might have been on a fishing trip?

You said that anyone on a fishing trip would have had something there.

What led you to believe that they might have been on a fishing trip?

A. Generally--it was just an assumption on my part at that point that they were.

Generally, when we stop boats and ask the routine questions, they generally are fishing or they're taking the boat out

for a test run to test it out.

Q In your experience, when you find this residue on the ground what do you usually find?

A Usually when we find residue, in my experience, we'll either find a stash of marijuana on the vessel or we'll find a secret compartment which has other residue in it which is an indication that perhaps at one time or another it did carry marijuana.

Q What did you do after you had gotten down on your hands and knees?

A After I had gotten on my hands and knees and picked up a little residue and saw the incongruency in the deck below the carpet, I asked my partner, Richard Nasossis, to come aboard the vessel and give me a hand.

Q Did he?

A Yes, ma'am, he did.

Q What happend then?

A I told him what I had found and he agreed that there was definitely something amiss.

We pulled back the carpet off the deck, which was--it was just lightly tacked down with a little adhesive, and he put his nose---

We did dind a hatch. It was basically rectangular in shape and secured by probably a dozen or more screws.

He got down on his hands and knees and put his nose to one of the seams in the hatch and took a whiff and came up and said yeah--he could smell what he thought was marijuana.

Q What did you do then?

A We proceeded to remove the screws from the hatch and lifted the hatch and the marijuana was visible--immediately visible--below the deck.

Q Have you seen marijuana before?

A Yes, ma'am.

Q To your trained eyes, this was marijuana?

A Yes, ma'am.

Q Did you run any test on it?

A Yes, ma'am, we did run a field test.

Q What did you do?

A We have a small test tube filled with a chemical agent whch, when exposed to THC, which is in marijuana and hashish, will turn bright red.

We removed a few leaves. I tore open one of the bales and removed a few leaves and a couple of seeds, put them in the tube, mixed it with the chemical , shook it up, and it tested positive and turned bright red.

Q How much marijuana was there?

A We found twelve bales and we estimated the weight to be approximately 1000 pounds.

These were somewhat large bales.

Q Did all of this take place in Dade County, Florida?

A Yes, ma'am.

[EXCERPT: CUSTOMS OFFICER CARLIN]

Q What did you do?

A As we approached in the vehicle, Officer Butchko, who was the Dade County man there, was sort of--I think he was getting ready to leave, and we identified ourselves as Custom Officers to him and we approached the vessel.

We informed the--well, I had what we call a Customs Raid jacket. It's a nylon windbreaker with the Customs badge, you know, embossed on it, and on the back it says, "U.S. Customs" I think in two inch lettering. It has a Customs patch on each sleeve.

So, they more or less knew who we were, but we identified ourselves with our badge holder in the case and told them we were from U.S. Customs and that we would like to inspect their vessel and check their documents on the vessel.

Q What happened next?

A I believe Mr. Zafra identified himself as the master of the vessel and he was asked for documents, I think, by--I believe Officer Nasossis who asked him for his documents in English, and I think I also asked him in Spanish, you know, to further clarify what we wanted.

At that time I returned to our vehicle to begin filling out a search and boarding form, which we routinely do in most cases involving Custom seizures.

MS. TARG: I have no further questions of this witness, Your Honor.

[EXCERPT: ARGUMENT OF PROSECUTOR]
[1. Customs Search]
MS. TARG: I will argue that it was a Customs search and, in determining whether the search was good or not good, you just have to look at the federal law on searches and the federal law on boarding on vessels.

Customs authority 19 U.S.C. 1581A provides that Customs has a right to board any vessel in Customs water to ask for documents or other papers regarding the boat within twelve miles of the coast of the United States, and this boat was seen coming from the waters.

The officers testified that it was only a few miles outside the Atlantic Ocean. It was clearly in Customs waters.

* * *

[2. Articulable Suspicion]
The Court cases have held that, in deciding whether there is reasonable suspicion, a Customs Patrol Officer is entitled

to assess the facts in the light of their experience, and you must look at the totality of the circumstances.

We would, for those reasons, argue that the test to be given is: Did these CPO's, in their experience in the Customs Service, have articulable facts together with rational inferences from these facts to engender a reasonable suspicion that the vessel in this case was being used for narcotics trafficking and, again, we rely on those cases and on U.S. versus Brignoni-Ponce, a Supreme Court case cites at 95 Supreme Court 2574.

[EXCERPT OF STATES BRIEF ON APPEAL TO FLORIDA 3d DCA]

B. Furthermore, the State would note that the officers did indeed have reasonable suspicion, based upon both their experience with smugglers and their observations, to board the vessel. See, United States v. Cortez, ___U.S.___, 101 S.Ct. 690 (1981); see, also, United States v. Mendenhall, ___U.S.___, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (approving use of profile characteristics); United States v. Forbicetta, 484 F.2d 645, 646 (5th Cir. 1973) (approving use of "profile" characteristics at border search). In Cortez the Court repeated its approval of an officer's use of his experience for probable cause and articulable suspicion thus:

> "The idea that an assessment of the whole picture yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment

> must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions --inferences and deductions that might well elude an untrained person." Emphasis added . 101 S.Ct. at 695.

Additionally, after the officers were on the vessel, they certainly acquired probable cause to search the hold from the presence and smell of marijuana on the deck . [Citations Omitted] . When the officers so clearly had probable cause to search the hold, the warantless search was obviously justified by the exigency exception for vehicles and boats. See, Carroll v. United States, 267 U.S. 132, 54 S.Ct. 280, 69 L.Ed. 543 (1925), adopted by statute in Florida Statute §933.19. See also, Texas v. White, 423 U.S. 67, 96 S.Ct. 304,

46 L.Ed.2d 209 (1975); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 419 (1970); State v. Lopez, 369 So.2d 623 (Fla. 2d DCA 1979). In Chambers v. Maroney, the Court explained the exigency requirement thus:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant (sic) is obtained; arguably, only the 'lesser' instrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment". [Emphasis added] 399 U.S. at p. 51-52.

Undoubtedly the exigency exception to the warrant requirement was manifest in the case at bar. The trial court's suppression

of the evidence is therefore erroneous even under traditional search and seizure analysis and must be reversed.

ORIGINAL

NO. 82-667

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RECEIVED
FEB 4 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

THE STATE OF FLORIDA,

Petitioner,

vs.

SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

PAUL MORRIS
2000 S. Dixie Hwy., Suite 212
Miami, Florida 33133
(305) 858-8820

WILLIAM A. CLAY
1395 Coral Way
Miami, Florida 33145
(305) 856-1411

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF CITATIONS.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....5

ARGUMENT.....5

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

RESPONDENT'S APPENDIX.....R.App. 1-86

TABLE OF CITATIONS

CASES

Earnest v. State,
293 So.2d 111 (Fla. 1st DCA 1974).....4,5

Reid v. Georgia,
448 U.S. 438 (1980).....8

State v. Nova,
361 So.2d 411 (Fla.1978).....2,7

United States v. Alfrey,
620 F.2d 551 (5th Cir.1980).....7

United States v. D'Antignac,
628 F.2d 428 (5th Cir.1980),
cert. denied, ___ U.S. ___,
101 S.Ct. 1485, 67 L.Ed.2d 617 (1981).....4

United States v. Freeman,
579 F.2d 942 (5th Cir. 1978).....5,7

United States v. Guillen-Linares,
643 F.2d 1054 (5th Cir. 1981).....4

United States v. Villamonte-Marquez,
652 F.2d 481 (5th Cir.1981).....4

OTHER AUTHORITIES

19 U.S.C., Section 1581.....4

Amendment IV, Constitution of
the United States.....5

STATEMENT OF THE CASE

The Brief of Petitioner on Jurisdiction is premised upon an incomplete record. As such, the petitioner's Statement of the Case and the Argument are not presented in the light most favorable to the order of the trial court granting the respondent's motion to suppress, by which standard, under Florida law, the District Court of Appeal of Florida, Third District, was required to review the order of suppression. State v. Nova, 361 So.2d 411 (Fla.1978). The following omitted portions of the record are offered as the Respondent's Appendix ("R.App."):

The order of the trial court granting the defendant's motion to suppress (R.App. 1-2);

The depositions stipulated into evidence: deposition of Customs Patrol Officer Richard Ogden (R.App. 3-22), deposition of Customs Patrol Officer Richard M. Nesossis (R.App. 23-63), and deposition of Customs Patrol Officer James A. Carlin (R.App. 64-77). Excerpts of the hearing on the motion to suppress. (R.App. 78-86). The petitioner and respondent agreed in the trial court to the admission of the aforementioned depositions at R.App. 78.

Viewed most favorably to the respondent, the facts as reflected in the complete record are as follows:

On October 10, 1980, federal Customs Patrol Officers Nesossis, Ogden and Carlin were observing a boat ramp at the Crandon Park Marina at Key Biscayne. As part of their activities, the officers were randomly stopping and boarding vessels for violations of state or federal law. (R.App. 7-8).

A twenty-five foot Bertram boat was being trailered. Respondent Zafra left the boat with another individual, Sanchez, and drove a truck connected to a trailer alongside the pier to trailer the boat. The federal officers observed a state police officer approach the boat in his patrol car. The officer, Public Safety Department Officer Butchko, pulled his car in front of the truck and conversed with

Sanchez and Zafra. Butchko shined his flashlight, looked into the boat, walked to the end of the pier and walked back to the truck with Zafra and Sanchez. (R.App. 29-33).

When Officer Butchko completed his investigation and walked away, the customs officers decided to board the boat. (R.App. 6-7). (Apparently after the customs officers decided to board the boat, they conversed with Butchko who indicated there was "something wrong but he couldn't see what it was or find it. So he intended to leave." R.App. 9.) The boat had been trailered and the officers identified themselves.

Officers Carlin and Nesossis detained Sanchez and Respondent Zafra while Ogden climbed aboard the boat and commenced a search. Ogden could not see the deck area until he had climbed aboard the boat. On his hands and knees, he felt the deck looking for any "incongruities" and he located a hatch under the carpeting. He pulled up the carpeting and Officer Nesossis put his nose to the hatch and smelled what he thought was marijuana. Ogden and Nesossis left the boat to obtain tools. They returned, removed the hatch, and seized marijuana. (R.App. 9-15).

The officers had received no tip or intelligence information regarding the boat. Their search was conducted pursuant to the random stopping of people in boats. Nothing unusual about the boat, Respondent Zafra, or Sanchez had been observed prior to the stop, detention, and search. The officers possessed no information indicating that the boat had been outside the territorial waters of the United States. (R.App. 13-17).

The federal authorities refused to prosecute because of the small quantity of marijuana discovered. Numerous telephone calls were placed to various state law enforcement agencies before the Public Safety Department agreed to take the case. The federal authorities, who had arrested the respondent and seized the boat and contraband, turned the

evidence, Respondent Zafra, and Sanchez, over to the State of Florida. (R.App. 79-82).

Respondent Zafra moved to suppress the warrantless seizure of the contraband as having violated his state and federal rights to be free from unreasonable searches and seizures. At the hearing on the motion to suppress, the State of Florida stipulated that the search and seizure could not be justified as having been a "border search." (R.App. 83-4).

Based upon the prosecution's stipulation and the testimony adduced upon deposition and at the hearing, the trial court entered a written order suppressing the evidence. (R.App. 1-2). The court ruled, in pertinent part that: Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974) mandated suppression; the facts of the case did not justify the warrantless search and seizure as permissible law enforcement activity pursuant to 19 U.S.C. § 1581; the stop of the respondent was not supported by reasonable or founded suspicion that criminal activity was afoot; and the warrantless seizure by state officers was not excusable. (R.App. 1-2).

The State of Florida appealed this ruling to the District Court of Appeal of Florida, Third District. In a one-paragraph affirmance of the trial court's order of suppression, the Third District rejected the state's argument that the reasonableness requirement of the fourth amendment did not limit customs officers where the stop and subsequent search of the vessel had occurred in [or near] inland waters. There having been no evidence of a border crossing, the Third District followed well-settled federal and state case law interpretation of 19 U.S.C., § 1581(a) requiring the prosecution to prove a prior reasonable suspicion of illegal activity, citing in its affirmance, inter alia: United States v. Villamonte-Marquez, 652 F.2d 481 (5th Cir.1981); United States v. Guillen-Linares, 643 F.2d 1054 (5th Cir. 1981); United States v. D'Antignac, 628

F.2d 428 (5th Cir.1980), cert. denied, ___ U.S.___, 101 S.Ct. 1485, 67 L.Ed.2d 617 (1981); Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974); and distinguishing United States v. Freeman, 579 F.2d 942 (5th Cir. 1978)(stop and boarding on open waters for document check was permissible; subsequent search based upon probable cause discovered thereafter was legal).

The Supreme Court of Florida unanimously declined the Petitioner's request to review the affirmance by the Third District. (Petitioner's App. 2).

SUMMARY OF ARGUMENT

The petitioner has characterized this cause as a "constitutional crisis". Brief of Petitioner at 11. This is simply not the case. The unanimous affirmance by the Third District Court of Appeal of Florida of the trial court's order of suppression follows a well-settled rule of law announced by the Fifth Circuit Court of Appeals over which there is no disharmony. That rule, as the Fifth Circuit has repeatedly announced, is as follows: customs officers are free to board and search a vessel without a warrant or even a modicum of suspicion of illegal activity where there is proof of a border crossing or its functional equivalent, or where the vessel is in customs waters; but where the vessel in question is in inland waters or landlocked, as in the case at bar, and there is no border crossing (or functional equivalent thereof), the fourth amendment requires that the boarding and searching be preceded by reasonable suspicion of illegal activity.

ARGUMENT

The witnesses for the petitioner conceded in the trial court that no border or border equivalent was involved. Rather, the boat in question was observed in a local marina, as it was being trailered from inland waters at the Crandon Park Marina.

> Q. It is my understanding that on the day in question, you [Officer Ogden] and Customs Patrol Officers Carlin

and Nesossis were located in a van, conducting certain surveillance at the boat ramp area at the Key Biscayne Marina?
A. Crandon Park Marina, that is correct. (R.App. 7).

* * *

Q. It is also my understanding that as the boat was being trailered, that is, put onto the trailer that was connected to a truck that had been backed down the boat ramp, the three of you officers approached Mr. Zafra and Mr. Sanchez and advised them that you were Customs Patrol Officers?
A. That is correct. (R.App. 9).

* * *

Q. While the vessel was on the trailer, isn't it true that you had to physically climb aboard it in order to see the deck area?
A. That is correct.
Q. Once you climbed aboard the vessel you began a search of the vessel?
A. That is correct, beginning with a visual examination. (R.App. 11).

* * *

Thus, the boat was on a trailer when the search took place. The boat was never observed in customs waters. As evidenced by the testimony quoted below, the customs officers were not acting upon any prior information.

Q. Had you, Officer Carlin, Officer Nesossis, or Officer Butchko received any tip or intelligence information pertaining to that boat in advance of intercepting and stopping Mr. Zafra and Mr. Sanchez?
A. No, sir.
Q. So, essentially, this stopping of Mr. Zafra and Mr. Sanchez was all part and parcel of your random stopping of people in boats?
A. That is correct.
Q. Did you or Officer Carlin, Officer Nesossis, or Officer Butchko have any information or evidence to suggest that that particular twenty-five foot Bertram had been outside of the United States?
A. No, sir.
Q. Did you have any information or evidence to suggest that that Bertram had been outside the territorial waters of the State of Florida?
a. No, sir. (R.App. 15-16).

The State of Florida contends in its brief that "it is undisputed that the vessel, which was searched was encountered by the Customs officer's herein in customs waters. A14; A25 (prosecutor argument)." Brief of Petitioner at 19. The appellate court and trial court properly rejected such a claim based upon the above quoted testimony that the boat was trailered at the time of the stop, boarding, and search. There is no evidence to the contrary at "A14" and the reference to "A25" is merely to argument of the prosecutor. Even were there conflicting evidence, the conflicts were resolved by the trial court in

favcr of the respondent. Under Florida law, the appellate court was bound on appeal to follow the trial court's resolution of conflicting testimony. See State v. Nova, 361 So.2d 411 (Fla.1978)

The petitioner's mischaracterization of this cause is further evidenced by reliance upon United States v. Freeman, 579 F.2d 942 (5th Cir. 1978) as conflicting authority. Freeman involved the boarding of a boat on waters three miles offshore. The boarding was by customs officers to examine the vessel's manifest, documents and papers. Here, however, the vessel was not in customs waters, the state stipulated that no border search rationale supported the search, and the officers stated that the boarding was pursuant to a practice of random stopping for any violation of any federal or state statute. Freeman does not conflict. Similarly, United States v. Alfrey, 620 F.2d 551 (5th Cir.1980) is not in conflict because the vessel in that case was in customs waters.

The petitioner's second contention is also refuted by the record. The petitioner suggests that the customs officers possessed a reasonable suspicion to conduct the search and seizure based upon their experience with smugglers. Brief of Petitioner at 23. The testimony provides otherwise. The officers clearly stated that the actions of Zafra and Sanchez and the appearance of the boat and trailer were wholly consistent with innocent behavior.

> Q. You have been testifying regarding three axle trailers and some type of profile associated with it. Is it not true that three axle trailers or four axle trailers are just as consistent with being used by innocent boat owners who happen to have large boats that necessitate that type of trailer equipment? Is that not true?
> A. Yes, sir.
> Q. There is nothing uniquely specific about three wheel or three axle or four axle trailers which inevitably point to involvement in drug smuggling, is there?
> A. They dictate a strong possibility in our opinions, but it's possible that they're--I'm sure that they're used by innocent persons.
> Q. Would you not agree that probably there are more three and four axle boat trailers used innocently--
> MS. TARG [Prosecutor]: Objection.
> Q. --than pursuant to a criminal venture?

MS. TARG: That would be calling for speculation, Your Honor.
THE COURT: He can answer, if he knows.
A. I would say that a large percentage of them are probably innocent. That's hard to say. (R.App. 85-6).

Further testimony established that the stop was random and based upon nothing suspicious.

Q. Did you have any specific fact that you can point to or state that caused you to believe that some kind of criminal activity was afoot regarding that boat?
A. [Officer Nesossis]: No, sir.
Q. Was there anything unusual about the boat whatsoever, as far as its water line?
A. No, sir. It was not--a boat like this, very heavy--it is an old boat, 1975--it was sitting low in the water.
Q. There was nothing unusual about the posture of the boat in the water?
A. No, sir. (R.App. 55-6).

• • •

Q. Was there anything unusual about this particular twenty-five foot Bertram or the two men, Mr. Zafra and Mr. Sanchez, prio to their being stopped and detained and the boat being boarded and searched?
A. [Officer Carlin]: No, sir. They were moving kind of fast, you know, in other words, when they arrived they were not dilly-dallying at all. They knew what they were doing. Some of the people, when they arrive, they seem to take forever to get their boat out.
They mounted it up pretty fast and were rolling--other than that, there was no information or previous information.
Q. However, this fast activity of trailering could have just reflected that they were efficient and knowledgable about trailering boats?
A. Sure, yes, sir. (R.App. 73-4).

Such innocent "profile" behavior and circumstances, without more, hardly afford a sufficient basis for a stop. See Reid v. Georgia, 448 U.S. 438 (1980). The smell of marijuana did not provide a legal basis for the seizure because the smell did not take place until after the officers had illegally stopped the Zafra and Sanchez, boarded the boat, and commenced a warrantless search.

Q. You certainly could not smell anything while you were in the van pertaining to the boat?
A. [Officer Nesossis]: No, sir.
Q. At the time you Customs Officers approached the two men, stopped them, detained them and advised them you were boarding the boat, you did not smell any aroma of any marijuana at that point, did you?
A. No, sir.
Q. In fact, marijuana odor was not smelled at all until you opened that hidden hatch?
A. That is correct. (R.App. 56-7).

Moreover, nothing excused the officers from obtaining a search warrant before the seizure of the marijuana.

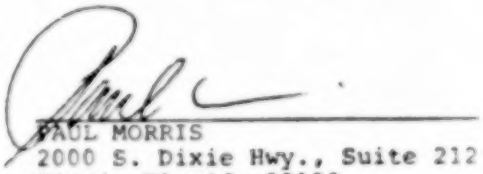
Finally, the petitioner seeks review on the basis that the customs officers acted in "good faith". Brief of Petitioner at 27. This claim was not presented to the trial court or appellate court, and is therefore not a proper basis for review.

The petitioner's request for certiorari review should be denied.

CONCLUSION

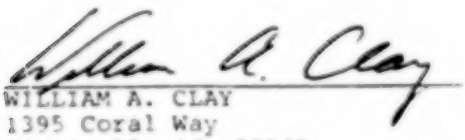
Based upon the foregoing, the respondent, Silvio Zafra, requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,



PAUL MORRIS
2000 S. Dixie Hwy., Suite 212
Miami, Florida 33133
(305) 858-8820

and



WILLIAM A. CLAY
1395 Coral Way
Miami, Florida 33145
(305) 856-1411

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 31st day of January, 1983, to Calvin L. Fox, Counsel for the Petitioner, Assistant Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128.

William A. Clay

WILLIAM A. CLAY

ORIGINAL

RECEIVED
FEB 4 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 82-667

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF FLORIDA,

Petitioner,

vs.

SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

RESPONDENT'S APPENDIX

1/

FILED
FEB 27
RICHARD P. BRINKER
CLERK

IN THE CIRCUIT COURT OF THE ... JUDICIAL CIRCUIT IN AND FOR ... COUNTY, FLORIDA

CRIMINAL DIVISION

CASE No. 80-19386 (Jd. Jorge

STATE OF FLORIDA,

Plaintiff,

vs

SILVIO ZAFRA,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE

THIS CAUSE having come on for a hearing before this Court upon the Defendant's Motion To Suppress Evidence Obtained Through An Unreasonable Search And Seizure Pursuant To Rule ... Of The Florida Rules Of Criminal Procedure, and this Court having received and considered all testimony, evidence, and exhibits introduced into evidence by the prosecution and by the defense and this Court having heard and considered argument of counsel for the prosecution and counsel for the defense, and this Court being fully advised in the premises for the aforementioned motion, this Court does make the following findings of facts and conclusions of law:

1. That the search and seizures complained of in the instant case do not qualify as "border searches" under either Florida or Federal law. This point was conceded by the prosecution at the outset of the evidentiary hearing and again during the argument.

2. That, predicated upon the facts of the instant case, the searches and seizures in question cannot be categorized and qualify as permissible law enforcement activities pursuant to 19 U.S.C. §1581. Thus, the prosecution cannot rely upon the provision of 19 U.S.C. §1581 to validate the search and seizure in question in the instant case.

3. That, considering the totality of the testimony, exhibits, and circumstances pertaining to the search and seizure in question, this Court does specifically find that the "stopping" of the Defendant, and the subsequent search and seizures were not predicated upon "reasonable" or "founded" suspicion that either

Customs violation had occurred or that any criminal activity was afoot involving the Defendant, his companion, or the vessel in question.

4. That, Earnest v. State, 293 S.O. 2d 111 (3rd D.C.A. 1974) is controlling and mandates the suppression of the evidence in the instant case.

5. That the search and seizures complained of in the instant case violate the search and seizure clauses of the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution.

6. That even assuming arguendo, that the search and seizures performed by officers of the United States Custom Service were predicated upon "reasonable" or "founded" suspicion, that the subsequent seizure of the evidence by officers of the Dade County Public Safety Department, without having applied for or obtained a search warrant, constitutes a further "unreasonable search and seizure" and therefore, violates Article I, Section 12 of the Florida Constitution. Predicated upon the totality of the facts and circumstances pertaining to the seizure of the evidence in the instant case by members of the Dade County Public Safety Department, this Court does specifically find that said Dade County Public Safety Department officers should have applied for and obtained a search warrant prior to the seizure of the evidence in the instant case.

Therefore, It Is Ordered And Adjudged that the Defendant's motion to suppress evidence, entertained by this Court on February 20th, 1981, is granted in its entirety and this Court does suppress the evidence described in the aforementioned motion.

Done and Ordered this the 27th day of February, 1981, nunc pro tunc effective February 20th, 1981, in open Court in Miami, Dade County, Florida.

STATE OF FLORIDA)
COUNTY OF DADE) S.S.

I HEREBY CERTIFY that this instrument is a true and correct copy as shown by files and records of my office. WITNESS MY HAND and official seal this

MAR 11 1981

RICHARD P. BRINKER
Clerk Circuit and County Courts
By _____ D.C.

JAMES R. JORGENSON
Circuit Judge, 11th Judicial Circuit
Dade County, Florida

2

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. 80-19386

STATE OF FLORIDA,

Plaintiff,

-vs-

SILVIO ZAFRA,

Defendant.

Office of Public Defender
8th Floor Justice Building
1351 N. W. 12th Street
Miami, Florida
Friday, January 30, 1981
3:35 o'clock p.m.

DEPOSITION OF RICHARD OGDEN

Taken by Ralph Francis, Notary Public in and for the State of Florida at Large, at the time and place set forth above, pursuant to Notice filed herein.

- - - - - -

3

APPEARANCES:

No appearance on behalf of the
State of Florida.

ROSEN, PORTELA, BRONIS, ANGUEIRA & CLAY, P.A.
By: WILLIAM A. CLAY, ESQ.
1395 Coral Way
Miami, Florida
On behalf of the Defendant.

- - - - - -

I N D E X

Witness	Direct	Cross
Richard Ogden	3	--

- - - - - -

Thereupon

RICHARD OGDEN

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLAY:

Q Would you state your name and occupation for the record.

A Richard Ogden. I am a Patrol Officer for the United States Customs Service.

Q How long have you been so employed?

A Approximately eighteen months.

Q Prior to that, how were you employed?

A Prior to that I worked as a temporary employee with the United States Customs Office of Investigations.

Q What kind of activities did you do in that position?

A In that position, primarily background investigation on persons or corporations applying for a Customs bonded license, and I also conducted investigations concerning minor navigation violations which violate a certain Code of Federal Regulations.

Q Prior to that job as a temporary employee, how were you employed?

A Prior to that I was a part-time employee with a retail grocery chain.

Q Did you have any previous experience with law enforcement?

A No, sir.

Q Calling your attention to the case of the State of Florida versus Silvio Zafra, which is a prosecution for Unlawful Possession of Marijuana, and Importation of a Controlled Substance into the State of Florida, I am going to ask you some questions about that particular case.

I assume you had some involvement in it?

A Yes, sir.

Q In the interest of saving time, I am just going to advise you that I have taken the deposition of Customs Patrol Officer Nesossis, and, unless you have any objection, what I propose to do is summarize what Officer Nesossis has advised me and ask you if that is correct.

A Okay.

Q If you feel that in order to accurately explain what you did or what the other officers did, you need to expand on an answer beyond a yes or no, or if you feel I am inaccurate or incorrect in any way, go ahead and interrupt me and set the record straight,

okay?

A Yes.

Q It is my understanding that on the day in question, you and Customs Patrol Officers Carlin and Nesossis were located in a van, conducting certain surveillance at the boat ramp area at the Key Biscayne Marina?

A Crandon Park Marina, that is correct.

Q It is also my understanding that this surveillance was being conducted by the three of you in the early morning hours?

A That is correct.

Q It is also my understanding that as a part and parcel of your surveillance activity, the three of you officers have been observing various vessels that approached the boat ramp and pier area.

A I don't really recall if a number of vessels, as you put it, came in prior to the suspect vessel, I really can't say for sure.

Q Okay. It is also my understanding that as part of your activities you were randomly stopping and boarding certain vessels for violations of the law?

A That is correct.

Q Essentially, this was in the nature of exploring for violations of Federal and State law?

A That is correct.

Q It is my understanding that you, Officer Carlin, and Officer Nesossis were observing a twenty-five foot Bertram cabin cruiser that had approached the pier near the ramp and observed a Public Safety Department officer in uniform approach that boat as it was positioned near the pier?

A That is correct.

Q At that point the three of you officers exited the van and began to approach the scene?

A We did that as the officer was leaving, more or less walking away from the boat.

Q Do you now know the Public Safety Officer to be Officer Butchko?

A Yes, sir. I have come across him a time or two since that.

Q Was Officer Butckho leaving the scene?

A He was walking away from the vessel. He was walking off the dock towards his vehicle when we decided we would go ahead and check the boat out further.

Q Was he alone or did he have any subject in his custody?

A He was alone.

Q Based on your discussions with Officer

Butchko, was he about to leave the scene, conclude his police activity and move on?

A To the best of my recollection, I believe he just walked up to the boat, shined his light into it briefly, and walked away, and as far as I can remember, he felt--he indicated that there was something wrong but he couldn't see what it was or find it. So he intended to leave.

Q In other words, he had made the mental decision to terminate his investigation and go on about his patrol?

A That is correct.

Q It is also my understanding that as the boat was being trailered, that is, put onto the trailer that was connected to a truck that had been backed down the boat ramp, the three of you officers approached Mr. Zafra and Mr. Sanchez and advised them that you were Customs Patrol Officers?

A That is correct.

Q By the way, were you officers in uniform or plainclothes?

A Plainclothes. We were wearing what we call raid jackets.

Q Which have an insignia?

A They have an insignia on the jacket, a

Customs patch on each side and in large yellow letters it says, "U. S. Customs" on the back.

Q It is my understanding that the three of you identified yourselves to Mr. Zafra and Mr. Sanchez as being United States Customs Officers---

A That is correct.

Q (Continuing) --and advised them that you were interested in boarding the vessel---

A That is correct.

Q (Continuing) --and that they were detained while a boarding of the vessel took place?

A That is correct.

Q It is my understanding that your primary activity at this point was to physically climb aboard the vessel and conduct a search---

A That is correct.

Q (Continuing) --whereas, Officers Carlin and Nesossis were primarily involved in detaining the two subjects and talking to them?

A That is correct.

Q While the vessel was on the trailer, isn't it true that you had to physically climb aboard it in order to see the deck area?

A That is correct.

Q Once you climbed aboard the vessel you

began a search of the vessel?

A That is correct, beginning with a visual examination.

Q When you say visual examination, what did you do?

A Basically, before I climbed on the boat I stood on the fender of the boat trailer and looked up over the edge of the boat into the boat and just did a quick visual scan of the deck and things on it.

The number one priority here is to make sure there is no other persons hidden on board or---

Q For your own safety?

What was the result of that particular aspect of your visual observation?

A I observed no other persons on the vessel, as far as I could see.

Q Did you observe anything that caused you any concern for your own safety or that of the other officers?

A No, sir. I did not. The first thing that caught my attention upon looking at the boat was the difference between the height of the deck and the bottom of the vessel. It was quite obvious that the height of the deck gave the appearance that a very large space existed under the deck.

//

Q That observation and conclusion that there was quite a bit of space between the deck and the bottom of the boat, you did not make that observation until you climbed aboard the boat, correct?

A Standing on the fender of the trailer wheels, looking in.

Q Looking over the gunnels?

A That is correct.

Q But from the ground level you were physically unable to make that observation?

A That is correct.

Q What else did you do once you climbed aboard the boat?

A I climbed aboard the boat with flashlight in hand, took a quick look into the cabin to make sure there were no other persons hiding in there that I couldn't see from the gunnel of the vessel, I came back out on the deck, looked around, got down on my hands and knees and rubbed my hand over the carpet which covered the deck.

Q Why did you do that?

A I wanted to see if I could feel any seams or cracks that would indicate there was a hatch there.

Q I assume that because you ran your hand over the carpet there was nothing visible to you?

A That is correct, nothing visible.

Q As a result of running your hand over the carpet, what did you perceive, or find out?

A When I ran my hands over the carpet I felt a very distinct rise or incongruency, I should say, in the deck. I could run my hand around the carpet and feel what appeared to be a seam, to me. There was a definite crack--the hatch or whatever it was at the time or what I thought it was at the time was not level with the rest of the deck. I felt that this probably could have been a hatch, and later proceeded to open it up.

Q Did you have to pull up the carpet in order to get to the hatch?

A That is correct. The carpet had to be completely pulled up off the deck.

Q Was the carpet fastened down by any means of adhesive, staples, nails, or anything?

A I believe a little bit of adhesive, drop spots here and there. It was not glued on really tight.

Q Now, at the point in time when you pulled up the carpet which was fastened to the deck by way of some adhesive material, did you know or have any idea whatsoever what might have been below the deck?

A With prior experience of myself and other officers, I suspected there was a good chance the vessel might have contained contraband.

Q Can you articulate any specific fact other than your experience, any specific fact about this boat at that point in time which caused you some suspicion that there might have been contraband below the deck?

A A couple of things. I noticed there were a lot of items on board the vessel which could have been indicative of a long trip, extra food, much more than the average person would take on a three or four-hour fishing trip.

Q Both individuals seemed to be acting a little nervous once they got the boat out of the water and we approached and identified ourselves.

I personally did not have any conversations with the suspects at any time, but just their reactions to routine questions by the other officers and things, something was definitely amiss.

When we pulled the carpet back and saw there was a hatch, Officer Nesossis put his nose close to the seam and reported that he smelled what he thought may have been marijuana at the time.

Q Did Officer Nesossis report this smell to

you before the hatch was opened?

A Right.

Q What happened next? Did you open the hatch?

A That is correct, he and I together obtained a few tools from our tool bag we usually carry with us and removed a number of screws--I don't remember how many--a dozen or more. It was a fairly large hatch--and removed the hatch and the marijuana was visible, right there.

Q Had you, Officer Carlin, Officer Nesossis, or Officer Butchko received any tip or intelligence information pertaining to that boat in advance of intercepting and stopping Mr. Zafra and Mr. Sanchez?

A No, sir.

Q So, essentially, this stopping of Mr. Zafra and Mr. Sanchez was all part and parcel of your random stopping of people in boats?

A That is correct.

Q Did you or Officer Carlin, Officer Nesossis, or Officer Butchko have any information or evidence to suggest that that particular twenty-five foot Bertram had been outside of the United States?

A No, sir.

Q Did you have any information or evidence to

suggest that that Bertram had been outside the territorial waters of the State of Florida?

A No, sir.

Q When you first observed the twenty-five foot Bertram, exactly where was it and what was it doing?

A When I first observed it, it was several yards away from the boat ramp, coming in the channel to the Crandon Park Boat Ramp, and pulling up next to the dock.

Q When you first observed Silvio Zafra, where was he located?

A I first observed both individuals when they stepped off the boat to get the truck and trailer to back it up.

Q Your vantage point was approximately one hundred and fifty feet from the boat when you were in the van?

A I believe it may have been a little further than that.

Q From your vantage point, could you positively identify the people on board the boat as Mr. Zafra and Mr. Sanchez?

A I had no idea who they were at the time. I just knew they were two males.

Q You eventually did learn the identities of the two people arrested as being Mr. Sanchez and Mr. Zafra?

A Correct.

Q Looking back and focusing on your observations of the two men who got off the Bertram, can you now say that you can positively identify those two men as being the Silvio Zafra and the Sanchez that were arrested?

A Yes, sir. I believe I can.

Q Was there anything unusual about the twenty-five foot Bertram or the two men, Mr. Zafra and Mr. Sanchez, that you observed prior to their being stopped, detained, and the boat boarded?

A Not particularly, no.

Q Again, the only reason that that particular boat and those two subjects were singled out is the fact that you were going to randomly stop them?

A That is correct.

Q I understand that none of this police activity was done with a search warrant?

A That is correct.

Q Did you, Officer Carlin, Officer Nescosis, or Officer Butchko have any information or evidence to suggest that the twenty-five foot Bertram and Mr.

Zafra and Mr. Sanchez had made any contact with any vessel that had been outside the United States?

A No, sir.

Q Did any of you officers that I have just mentioned have any information or evidence to suggest that the Bertram and the two occupants, Mr. Zafra and Mr. Sanchez, had any contact with a boat that, itself, had had contact with a vessel outside the United States?

A No, sir.

Q So, for all you knew, that particular boat and the two men might have been returning from a fishing trip off the edge of Cape Florida?

A That is correct.

Q In other words, that boat could have been within the confines of Biscayne Bay the whole time it had been out?

A That is correct.

Q You had no conversation with Mr. Zafra or Mr. Sanchez?

A No, sir.

Q So you have no knowledge of whether or not they made any incriminating statements?

A No, sir. I have no knowledge.

Q Did you overhear anything that Officer

Carlin and Officer Nesossis said to Mr. Zafra and Mr. Sanchez other than identifying themselves as Customs Patrol Officers and advising they were going to be detained while a boarding and search was conducted?

A No, sir. I had no conversation. My proximity was in the vessel the entire time of the search.

Q When the three of you Customs Patrol Officers approached these two men, Mr. Zafra and Mr. Sanchez, it is my understanding you identified yourselves, all three of you, and told them that it was your intention to board the boat and search it?

A That is correct.

Q And you advised them they would be detained while the boarding and search took place?

A That is correct.

Q And you requested them to produce registration or documents for the boat?

A I did not. I believe one of the other officers did.

Q Neither Mr. Zafra or Mr. Sanchez were free to go or leave at that point?

A No, sir. They were not.

Q They were advised that they were detained

while this was going on?

A I don't think it was specifically defined that they couldn't leave, but we had no intention of letting them leave.

Q It was also pretty apparent to them that they were restrained until your activities were over?

A Yes, sir.

Q As I understand it, they were nor formally advised that they were arrested until after you discovered bales of marijuana below deck?

A That is correct.

Q It is also my understanding that no one advised them of their Constitutional Rights to remain silent, their privilege against self-incrimination and their right to have an attorney present until after they were formally arrested?

A Yes, sir. I believe that is correct.

Q Is there anything else you can remember about this case?

A No, sir. It happened quite a while ago, and I have been involved in a dozen or more since then.

Q Do you have any evidence or information to suggest Silvio Zafra, Mr. Sanchez, or the twenty-five foot Bertram had been involved in importing or

bringing marijuana into the State of Florida from a place outside of the State of Florida as opposed to merely transporting marijuana within the State?

A No, sir. I have no information regarding that.

Q It is my understanding that no marijuana was found in the physical possession of Mr. Zafra and Mr. Sanchez, that is to say, in their hands or on their person?

A Not to the best of my recollection, I don't believe so.

MR. CLAY: I have no further questions.

You have a right to read and sign this deposition when it is typed up, if you want to. It is totally your choice.

THE WITNESS: I will waive that right. I will get to see it, anyway.

(Thereupon the taking of the deposition was concluded at 3:55 o'clock p.m.).

(Thereupon reading, signing, and notice of filing were waived).

CERTIFICATE OF NOTARY

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, RALPH FRANCIS, Notary Public in and for the State of Florida at Large, do hereby certify that I reported the deposition of RICHARD OGDEN at the time and place hereinabove set forth; that the witness was first duly sworn by me; and that the foregoing pages numbered from 1 to 20, inclusive, constitute a true and correct transcription of my stenographic report of the deposition of said witness.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by any of the parties connected with the action, nor financially interested in the action.

WITNESS MY HAND AND SEAL at Miami, Dade County, Florida, this_____day of February, 1981.

_____
Notary Public

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. 80-19386

STATE OF FLORIDA,

Plaintiff,

-vs-

SILVIO ZAFRA,

Defendant.

Office of Public Defender
8th Floor Justice Building
1351 N. W. 12th Street
Miami, Florida
Friday, January 30, 1981
2:40 o'clock p.m.

DEPOSITION OF RICHARD M. NESOSSIS

Taken before Ralph Francis, Notary Public in and for the State of Florida at Large, at the time and place set forth above, pursuant to Notice filed herein.

- - -

APPEARANCES:

No appearance on behalf of the
State of Florida.

ROSEN, PORTELA, BRONIS, ANGUEIRA & CLAY, P.A.
By: WILLIAM A. CLAY, ESQ.
1395 Coral Way
Miami, Florida
On behalf of the Defendant.

- - - - -

I N D E X

Witness	Direct	Cross
Richard M. Nesossis	3	--

- - - - -

Thereupon

RICHARD M. NESOSSIS

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLAY:

Q Would you state your name and occupation for the record?

A Richard M. Nesossis. I am a Customs Inspector at Miami International Airport.

Q How long have you been so employed at Customs?

A I have been with Customs for approximately fourteen months.

Q How long have you been assigned at the airport?

A I have been an inspector for a month and a half.

Q Prior to that, what was your assignment?

A I was a Customs Patrol Officer assigned to the Customs House on the Miami River.

Q You say you have been with Customs for fourteen months?

A Yes.

Q Prior to that, where were you?

A I was a police sergeant with the Panama Canal

Zone Police Department, Panama.

Q How long were you employed by the Canal Zone as a police officer?

A Seven years.

Q Calling your attention to the case of State of Florida versus Sylvio Zafra, did you have occasion to be involved in that particular case?

A Yes. I did.

Q On what date and at what time did you first have any involvement in the case?

A It was on October 10, 1980, at approximately 3:45 a.m. on that morning.

Q What was your first involvement or knowledge regarding this case?

A Myself and two other CPO's were on surveillance at the Crandon Park Boat Ramp on Key Biscayne, surveillance of the boat ramp.

Q Who was with you?

A CPO James Carlin and CPO Richard Ogden.

Q Where were you located in your surveillance at that point in time when you first had some involvement in this case?

A We were in a van parked at the boat ramp.

Q Was this a standard-type surveillance van with windows that you could see out of but which could

not be seen into?

A We have two vans. I believe we were in a GSA van which is like blue with regular windows. I'm not sure which van we were in that night.

Q Was the van stationary?

A Yes, sir, it was.

Q Where was the van located in relation to the boat that was eventually seized?

A The van was parked in one of the areas that is marked for parking vehicles with trailers. It is not directly in front of the boat ramp.

As you are facing the boat ramp, it would be to the right, approximately one hundred and fifty feet.

Q Did you or the other Customs Patrol Officers, Officers Ogden and Carlin, have any tip or information that a particular boat would be coming in laden with contraband?

A No, sir.

Q So this was just routine surveillance that might or might not yield an observation of some criminal conduct?

A Yes, sir, that is correct.

Q Had you had any contact with Public Safety Department officers relative to your surveillance?

A No, sir, not at that time.

Q What is the first observation you or the other officers, Officers Carlin or Ogden, made regarding this case?

A We were in the vehicle watching the boat ramp and at approximately 03:45 hours a twenty-five foot white Bertram came up the channel and docked at the pier, at one of the piers at the boat ramp--there is two finger piers.

Q Which pier did the Bertram dock at?

A It is the first pier which is closest, at that time was, closest to the office, the Marina office.

Q Where would that pier be in relation to your vantage point in the surveillance van?

Would that be the closest pier to you?

A It would be the closest pier to us, yes, sir.

Q You said that would be one hundred and fifty feet away from you?

A Approximately one hundred and fifty feet.

Q What time did you say this was, 3:45 a.m.?

A 3:45 a.m., yes, sir.

Q Were you, Ogden, and Carlin using any kind of devices to enhance your ability to see, such as

binoculars or night scopes or anything?

A We were using binoculars. We were not using night scopes.

Q How many sets of binoculars did you have?

A One pair. Officer Carlin carries a pair with him.

Q What was the first observation that any of the three of you Customs Patrol Officers made with regard to this case?

A Well, the boat came in and docked, and one of the individuals left the boat and went to a truck that was connected to a trailer parked directly in front of the boat ramp and backed the truck and trailer down into the water to put the boat on.

Q Do you now know which individual left the Bertram and went to the truck and backed the truck up?

A Yes, sir, that was Defendant Zafra.

Q What else did you observe?

A Before the men got the boat out of the water, a PSD Patrol vehicle pulled up and stopped in front of the truck at the boat ramp.

Q This was a marked police unit?

A Yes, sir, green and white, PSD.

Q Let me go back a little bit in the sequence

of events.

When the person you now recognize to be the Defendant, Sylvio Zafra, left the boat and went and got the truck--did the truck have a trailer on it, first of all?

A Yes, sir.

Q Did he back the trailer and the truck down the boat ramp?

A Yes, sir.

Q Did he back the trailer into the water?

A Yes, sir. The trailer was in the water and he stopped the truck and got out of the truck.

Q At that point what was being done with the Bertram?

A It was tied up to the dock. The other individual was with the boat on the dock. It was just floating in the water, sitting there.

Q Do you now know who the other person was who stayed with the boat while Mr. Zafra went to get the truck?

A That was Defendant Sanchez.

Q Where was the boat in relation to the truck and trailer when the Public Safety Department unit pulled up?

A The truck and trailer were directly in front

of the boat as if they were going to load it.

Q So the truck and the trailer would have been running parallel to the pier?

A Yes, sir.

Q Had the boat been pulled up to the trailer to begin the loading process?

A No, sir.

Q Was there any coordination between you, Officer Carlin, Officer Ogden, and the Public Safety personnel that pulled up?

A No, sir.

Q That was not arranged between the two agencies?

A No, sir.

Q What did you observe take place after you observed the Public Safety Department unit approach the area you have just mentioned?

A The officer got out of the car and went down onto the pier, and he appeared to be conversing with the two individuals. He shined his flashlight, looked over into the boat, and then walked down to the end of the pier and walked back to the truck with both individuals.

Q Do you know Officer Butchko?

A Yes, sir.

Q Was Officer Butchko alone?

A Yes, sir.

Q Were there any other officers or people in the Public Safety Department vehicle he was driving?

A No, sir.

Q When Officer Butchko walked down the pier and approached the Bertram, did he go aboard the Bertram?

A No, sir.

Q Is that when you saw him use a flashlight?

A Yes, sir.

Q Where was the Defendant, Sylvio Zafra, when Officer Butchko went down to the boat and flashed a light on it?

A I believe he was standing by the pick-up truck and the other individual was out on the pier by the boat.

Q In terms of walking distance from the truck to the boat, can you give me an estimate of what that distance would be?

A Approximately thirty feet, twenty feet, twenty-five feet.

Q How long did Officer Butchko stay in the vicinity of the boat at the pier?

A As soon as he walked back down the pier with both individuals, we approached their location and got out of our vehicle.

Q But how long did Officer Butchko stay around the boat making observations?

A Possibly thirty seconds, just briefly, very briefly.

Q Could you see where Officer Butchko's light focused on the boat?

A No, sir. We could just tell he did shine it down inside, that was it.

Q Can you tell me where he was standing in relation to the bow and stern of the boat?

A He was standing approximately, maybe, six feet from the stern, right even with the gunnel, not quite halfway. He was in the forward--the rear portion, about six feet from the stern.

Q Was it high tide, low tide, or ebb tide at that time, do you know?

A I'm not sure.

Q Do you recall whether or not Officer Butchko stooped down or scrooched down in order to make his observations?

A No, sir. I don't believe so. He just stood up and leaned out over the boat and shined his

flashlight, and that was it, and walked back.

Q After Officer Butchko shone the flashlight, is that when you walked down the pier towards the truck in the company of Mr. Sanchez?

A Yes, sir.

Q What happened from that point on?

A Okay, at that time we decided to approach the three individuals and let Officer Butchko know we were there. We did. We identified ourselves at that time, and more or less, took over the boarding.

We advised Mr. Zafra and Mr. Sanchez that we were Customs Patrol Officers and that we were going to board his vessel.

We wanted to see his papers. At that time they loaded the boat on the trailer and pulled the boat out of the water.

Q Who did the talking for you Customs Officers, was there a lead officer?

A Myself and Officer Carlin were the two officers that talked to Mr. Zafra and Mr. Sanchez.

Q Do you speak Spanish?

A I don't speak fluent Spanish, but I do speak some Spanish; Officer Carlin does speak Spanish.

Q What you said to Mr. Zafra and Mr. Sanchez, was it in English or Spanish?

A I believe I spoke to him in English.

Q Did Officer Carlin speak Spanish to both men?

A Yes, sir. He did.

Q Do you know what Officer Carlin said to the men in Spanish?

A Not exactly, but I believe he told them that we were United States Customs Inspectors and that we did want to look at his boat registration papers, and advised him that we were going to board the vessel.

Q Now, I am a little unclear as to how the loading of the boat took place in light of the fact that you officers from Customs had advised Mr. Sanchez and Mr. Zafra that you wanted to see the documents for the boat, and that you were going to board it.

Were they requested to pull the boat out of the water onto the trailer, or did they go ahead and load the boat on the trailer before you told them you wanted to board the boat?

A I'm not sure if we requested them or not. Everything happened in, more or less of a sequence, and when we got there we advised them we were going to board the boat, and at the same time, they loaded it on.

One of us may have requested them to put in on the trailer. I really don't know if we did or not.

Q Were they in the process of loading the boat when they were approached?

A Yes, sir. They were going to put the boat on the trailer, yes, sir.

Q It was just a matter of a moment or two one way or the other?

A Yes, sir.

Q Now, were Mr. Zafra and Mr. Sanchez free to go, or were they being detained from the moment when you and the other two Customs Officers identified yourselves and presented authorization?

A Yes, sir. They were being detained.

Q What else was said by all parties to this activity?

A We normally ask the standard questions, such as where have you been, how long have you been gone, are there any other parties, do you have any foreigners on board, where are your papers, and who is the owner of the boat, and things like that.

Q Who asked those questions?

A I asked some of them, and Officer Carlin asked some of them.

Q What you asked you asked in English?

A Some of them I may have asked in Spanish, like if they were fishing, simple questions.

Q Did Officer Carlin speak exclusively in Spanish to these individuals?

A Yes, sir. I'm pretty sure he spoke Spanish.

Q Do you recall if Mr. Zafra or Mr. Sanchez answered any of these questions?

A Yes, sir. They did.

Q What did Mr. Zafra say and what did Mr. Sanchez say?

A Mr. Sanchez made a few comments; Mr. Zafra said he had been out fishing in the Key Largo area and that they had gone out earlier that evening and they had gone strictly for fishing, and the boat was not his. It was a friend's boat and he had borrowed it.

Q What else was asked of the two men, and what else did they say?

A At that time that was more or less it. While myself and Officer Carlin were on the ground, Officer Ogden had already entered the boat and was going to perform a Customs search.

Q In other words, while you and Officer Carlin were identifying yourselves to Mr. Zafra and

Mr. Sanchez, and while you were detaining them and asking them the questions that you have just mentioned, Officer Ogden went directly to the boat and boarded it?

A Right, yes, sir.

Q How did Officer Ogden board the boat?

A Well, it was on the trailer. He crawled up over the stern of the boat.

Q Was the stern portion of the boat in the water?

A No, sir. The boat was completely out.

Q Had the truck been driven forward in order to clear the water?

A He had moved it forward, yes, sir.

Q Were Mr. Sanchez and Mr. Zafra in the truck in the process of driving away when the three of you Customs Officers approached them?

A No, sir.

Q I am not quite picturing this clearly.

Did they pull forward and then stop, and as they were about to do something, that is when you came forward?

A No, sir. We came forward while Officer Butchko and the two individuals were standing by the truck, and, at the time we approached them and talked

to Officer Butchko and told him who we were, and at the same time Mr. Sanchez and Mr. Zafra pulled the boat out of the water, put it on the trailer, and pulled the truck forward at, more or less, the same time.

Q Did either you or Officer Carlin advise Mr. Zafra and Mr. Sanchez that they were being detained, that they couldn't go anywhere until you finished the questioning that you were engaged in and the boarding of the boat that you wanted to do?

A We may not have come right out and told them that they were being detained and that they couldn't go anywhere, but we did tell them that we were Customs and we were going to perform a search, and they cooperated. There was no--they didn't ask any questions like why or can't we go or anything else. They were very cooperative.

Q Based on what you said and what Officer Carlin said to them, they were certainly given the impression that they were not free to go?

A Oh, sure, right.

Q Where was Officer Butchko while all this was going on?

A He was standing with myself and Officer Carlin.

Q Was he doing any talking?

A No, sir.

Q At this point were you Customs Officers the primary officers involved in the investigation?

A Yes, sir.

Q Prior to the Public Safety Department, Officer Butchko, coming to the boat as it was tied up to the pier, had you Customs Officers made a decision what you were going to do regarding that boat?

A Yes, sir.

Q What decision had you made?

A We had decided, as soon as the two individuals had taken the boat out of the water, that we would approach them and perform a routine boarding.

Q During this duty shift that you were engaged in out there at Crandon Marina, had you been randomly approaching boats and boarding them and searching them?

A Yes, sir.

I couldn't say how many we did board that particular night, but that was our intentions, and I don't remember if we had boarded any or not. I'm pretty sure we had.

Q Basically, what you were doing was surveilling the area and exploring whether or not any boat had contraband in violation of United States or State law?

A Yes, right. We have, more or less, a profile we look for. Those boats that come in and meet certain ID and characteristics, we do board.

Q What did you observe Officer to do after he crawled aboard the boat?

A Okay, from the time Officer Ogden crawled on the boat, I didn't observe him until he called and advised me would I come aboard. He wanted to show me something, at which time I did get into the boat.

Q What was the first thing Officer Ogden did in the course of his inspection of the boat, to crawl aboard it?

In other words, he didn't go looking around the exterior of the boat first. The first thing he did was crawl aboard?

A I went around the outside, myself. I did that.

The first thing he did was crawl aboard. He was there several minutes, and then he called me.

Q Did you walk around the boat inspecting the

exterior of the boat before Officer Ogden boarded it?

A No, sir. He was already on board. After I stood with Carlin for several minutes, I checked the exterior, walked around.

Q Can you describe this boat, particularly as far as length, beam, construction, and lay-out?

A It is a twenty-five foot Bertram, fiberglass. It was white, I believe, with blue trim. It is a cabin cruiser-type, it is an older boat that does have a forward cabin that you go down into that has bunks in it.

Q That would be a V-berth type cabin?

A Right, yes.

Q What about what you were---

A Its cabin top is a hard top, not a canvas-type top like a Bimini top. It is a molded fiberglass, solid piece.

Q Is there a walk-in cabin which is on the same level as the aft deck?

A No, sir. You have to walk down into the cabin. It is a Cutty-type cabin.

Q What is located on the boat at the point where you had been walking down to the forward cabin?

A Okay, on the right is the helm, the steering

wheel, and then on the left there is a chair, I believe, and an ice chest.

There were some other boxes. I believe there were other boxes, ice chests, to the left, which are built in behind one of the seats, but I'm not sure which it was, and the whole deck was carpeted with this green outdoor-type carpet, artificial grass.

Q This was on the aft deck?

A Yes, sir.

Q Now, the area where the helm is located, is this under the hard top that you have described?

A Yes, sir.

Q Was the companion way door or the doorway to the forward cabin closed at the time Officer Ogden went aboard?

A I'm not sure.

When I got aboard, there was no door there. I don't remember if there even was a door. There was not a door when I got aboard, it was not closed, if there was one.

Q When Officer Ogden called you, what did he say to you?

A Okay, he informed me that he had found what he suspected to be marijuana, suspect marijuana

residue all over the carpet inside the carpet, there, and that he thought that there was a hatch cover of some type underneath the carpet, directly before you approach the stairs, going down into the cabin.

He was asking my opinion, more or less, what I thought there was.

Q Did you then go aboard?

A Yes, sir. I did.

Q Did you observe any residue?

A Yes, sir. I did. There was a lot of seaweed, what appeared to be seaweed, and mixed in with that were marijuana seeds and particles of stems and what-not scattered all over the deck, plus there was a strong residue of lysol-type soap, such as Mr. Clean, and the carpet was soaked in it.

Q Can you give me a specific location where you observed the residue on the carpet?

A It was from in front of the engine cover, all the way to where you go down the stairs. It was in an area approximately five by five. It was everywhere. It was scattered all over the carpet.

Q There was also seaweed?

A Yes, sir. There were particles of this common seaweed you find washed up on the beach, mixed in with it.

Q In order to observe this residue and determine enough characteristics of it to form an opinion that it was marijuana, it was necessary to pretty much get down on all fours and look closely?

A Yes, sir. I did get down on one knee and pick quite a bit of it up, and that is when I discovered the lysol or whatever, because it soaked right through my pants and it was a bright yellow color.

Q Do I have an accurate mental picture here that the seaweed and the lysol was, kind of, camaflouging the residue to an extent so that it was necessary to get right down and perform a very close visual inspection?

A Correct. My opinion was that the lysol soap and past experience, it is used to cover up any smell that you would have if you had any marijuana contraband on board, and the seaweed would not be too uncommon for someone who had gone out fishing, possibly, but there was a more than normal amount on the deck, plus, when we did find the suspect marijuana residue, it was not unusual in that fact.

Q Officer Ogden asked you your opinion as to whether or not there might be some kind of a hiding place?

A Yes, sir. He had felt what he thought to be a hatch cover underneath the carpet, which he showed me, and I did agree with him that there was a hatch cover under there of some type.

Q While you and Officer Ogden were having this discussion and doing the inspection and search you have just described, what was Officer Carlin doing?

A We have a standard boarding form which we do fill out when we board a boat that has information on it of the Master of the vessel, the crew people on it, a description of the boat, registration information, where the boat is coming from, any unusual circumstances, which Officer Carlin--we carry a clip board with those forms--and at that time he was filling out the form.

Q Who was he getting the information from in order to fill out the boarding form?

A As far as I know, he was getting it from Mr. Zafra.

Q Did you overhear information being given to Officer Carlin by Mr. Zafra?

A Not at that time. I was on the boat.

Q It is more or less your assumption that that is what he was doing?

A When I left him, that is what he was going to

do.

Q What else did you, Officer Ogden, and Officer Carlin do?

A Okay, myself and Officer Ogden proceeded to pull the carpet that was covering that hatch, which we did, and the hatch was being held in place by approximately ten stainless steel screws, which I went to our truck--we carry a small bag that we carry test kits and tools in--I went to the van and got the bag that I carry, went back on board and took the screws out of the panel.

Q By the way, while the boat was on the trailer, were the gunnels of the boat over the height of the eyes of all of you?

A Yes, sir.

Q In other words, when the boat was on the trailer, in order to see into it and see the deck, it was necessary to physically climb aboard?

A You'd have to stand up on the trailer and hang on to the gunnel to look in. I had to do that one time.

Q Did there come a time when you, with the aid of tools, got the hatch out?

A We used the screw driver and took the screws out to get the hatch off.

Q What did you discover?

A Twelve bales of suspect marijuana. At that time we ran a field test, which proved positive.

Q Were they packaged in any fashion?

A Burlap and plastic.

Q Was the burlap and plastic intact, or were there any bales broken open?

A No, sir. I believe they were all intact.

Q What happened next?

A At that time I got off the boat and I advised Carlin that the boat--that we did discover the twelve bales.

At that time the two individuals were placed under arrest.

Q Okay. How were they placed under arrest, and by whom?

A Okay, we advised that we did find the marijuana on board and they were under arrest for the importation of marijuana.

I put the handcuffs on Zafra, I believe, and Carlin put the handcuffs on Mr. Sanchez.

Q Up until this point in time were Mr. Zafra and Mr. Sanchez advised of anything else?

Had they been told their rights to remain silent, have an attorney present, and so forth?

A Not up until that time, no, sir. Not unless Officer Carlin did it, and I don't believe he did it.

Q When they were advised they were under arrest for the importation of marijuana, did anyone advise them of their Constitutional Rights?

A Yes, sir. I read them in English and Officer Carlin read them in Spanish.

Q Were they given any forms or papers to sign to indicate that they understood those rights?

A Not at that time, no, sir.

Q Did Mr. Zafra or Mr. Sanchez say anything after being advised of their rights or during being advised of their rights?

A Not at that time, no, sir.

Q Did they say anything or did they merely listen to the rights?

A At that time they listened to them and they stated that they understood them.

Q Where was Officer Butchko when the formal advisement of arrest and Constitutional Rights took place?

A He was standing right there, right next to them.

Q What happened next after the formal arrest and advisement of Rights?

A Okay, we took the trailer and the truck, the boat and two prisoners back to the Miami Customs House on the river, on 5th Street, to fill out our paper work and to contact our supervisor and DEA concerning the case.

Q What took place on the ride back to the Customs House, anything of significance to the investigation?

A No, sir.

Q Was there any conversation with the defendants?

A No, sir. I drove the--another officer came and drove the truck and pulled the boat back, and Officer Ogden rode with him in the truck.

Myself and Officer Carlin drove the van back with the two prisoners, and there was no conversation that I can remember on the way back.

We wait until we get back to our office and get our paper work before we do anything else.

Q What about Officer Butchko, did he remain with you?

A No, sir, he did not. He, at that time, went about his business. We left him at the boat ramp and--he was assigned to that Key Biscayne Patrol.

Q What happened when you all arrived at the

Customs House?

A Officer Ogden stayed downstairs with the boat and the trailer, and the truck, and myself and Officer Carlin went upstairs, separated the two prisoners, and we proceeded to fill out our arrest or 151 reports, and other paper work.

We contacted DEA, who declined to prosecute on the case.

Q Who did you contact?

A I don't know the DEA officer's name that we called. I don't have the paper work on that.

Q Who conducted that discussion with the DEA personnel?

A I believe Officer Chuck Lampard did. I'm not positive. He was another officer working that night. He is a boat captain.

If he did not, Officer Carlin may have. But I believe Officer Lampard did.

Q Do you know why DEA declined to prosecute the case?

A They wouldn't prosecute anything under two thousand pounds, and they are swamped with work, as they say.

Q What was the quantity involved here?

A Approximately one thousand pounds, twelve

bales.

Q Were you ever advised of an accurate weight?

A No, sir. I was not. I believe it was less than that. I heard conversation that there was less than that, approximately eight hundred pounds, I'm not sure. I was never advised of an accurate amount.

Q Were there any statements whatsoever made by Mr. Zafra or Mr. Sanchez at the Customs House?

A Yes, sir. Mr. Zafra did make a statement to me concerning his activities.

Q Were you questioning Mr. Zafra?

A No, sir. I was not. He was asked information concerning this R-151 form, and as to his activities---

Q Personal history, you mean?

A Personal history-type of stuff, and he did make a statement voluntarily to me about his activities.

Q Do you recall what you were asking him, specifically, when he made a statement about the facts of the case?

A I believe I was asking him concerning the ownership of the boat, and he stated that it was a friend of his and that, you know, he had borrowed it to go fishing, and he stated that several days prior

to this he had been fishing down in the Key Largo area and that he had discovered a stash of marijuana bales in the Key Largo area, and that he and Mr. Sanchez had gone back this particular day or the night before to retrieve that stash, and he stated that he needed the money for his kids.

Q Did Mr. Zafra say anything else to you or did you pursue any further questioning?

A No, sir.

The other questions were who the owner of the boat was and his personal history, and that was more or less it.

Q Who did Mr. Zafra say owned the boat?

A He said it was a friend named Juan Valdez, and we did have paper work on it. He was the owner of the boat.

Q When you and the other officers initially approached Mr. Zafra and Mr. Sanchez, did you inspect the paper work on the boat at that time?

A Yes, sir. We asked him for the registration paper work, which is our normal practice, and we use it to get the information on the boat as far as the description and FL numbers--we check FL numbers to make sure the boat is the one on the paper work, and all the paper work is up to date and complete, whatever.

I didn't have that paper work. I believe Officer Carlin had it at that time.

Q Now, going back to your first contact with Mr. Zafra and Mr. Sanchez, when questions were being asked about the ownership of the boat and what they had been doing, Mr. Zafra made a statement there at the ramp area that they had been fishing?

A Yes, sir, right.

Q Did he say where they had been fishing at that point in time?

A Yes. He told me in the Key Largo area.

Q Did you or any other Customs Officer of Public Safety Officer ask Mr. Zafra or Mr. Sanchez specifically where they had been fishing?

A No, sir.

Q When you and the other Customs Officers approached Mr. Zafra and Mr. Sanchez to advise them that they were going to be detained for a while, while you conducted a boarding of the boat, did you or any of the other officers have any information that that boat had been outside of the United States and that that boat had crossed the border and had re-entered the United States?

A No, sir.

Q Did you officers, by you I mean all three

Customs Officers, or Officer Butchko, have any information or evidence that this particular boat had made any contact with a boat that had been outside of the United States?

A No, sir.

Q Did you have any information or evidence that this Bertram in question in this case had any contact with any vessel that had, itself, had contact with a boat that had been in contact with a boat that had been outside of the United States?

A No, sir.

Q Was there anything particular about this particular Bertram vessel that caused you Customs Officers to decide to approach the individuals that had been on the boat, detain them, and board the boat?

A No, sir. There was nothing in particular outstanding about this boat that made us do it, you know, out of the ordinary.

Q So, essentially, this was part--this stopping of the two men, detaining of them, and advising them you were going to board the boat--was part of the random stopping and boarding you had been doing that morning?

A Yes, sir. It was. The boat was an extremely large boat. It is not unusual for a boat

that length to be on a trailer, but as far as beam and height and everything, it is a large boat. The time of the morning and everything, it fit a profile.

Q Did you have any specific fact that you can point to or state that caused you to believe that some kind of criminal activity was afoot regarding that boat?

A No, sir.

Q Was there anything unusual about the boat whatsoever, as far as its water line?

A No, sir. It was not--a boat like this, very heavy--it is an old boat, 1975--it was sitting low in the water.

Q There was nothing unusual about the posture of the boat in the water?

A No, sir.

Q You certainly could not smell anything while you were in the van pertaining to the boat?

A No, sir.

Q At the time you Customs Officers approached the two men, stopped them, detained them and advised them you were boarding the boat, you did not smell any aroma of any marijuana at that point, did you?

A No, sir.

Q In fact, marijuana odor was not smelled at

all until you opened that hidden hatch?

A That is correct.

Q As I understand it, when you officers approached Mr. Zafra and Mr. Sanchez and advised them that they were going to be detained while you boarded the boat, they were cooperative in the sense that they did not resist?

A Correct, right.

Q But they were not asked for permission to board the boat, were they?

A No, sir.

Q Maybe you can clear up a question I have.

Officer Butchko was the author of the arrest report in this case, what we call an A-form, and on the arrest report or A-form it reflects that these men were charged with Trafficking of Marijuana over a thousand pounds, Possession with Intent to Distribute, Conspiracy to Commit a Felony, to-wit: Narcotics violation, and Possession of Marijuana over a Thousand Pounds.

Q Do you know when Officer Butchko re-entered the picture and prepared this paper work?

A After we contacted DEA and they declined, then we contacted the Central PSD Unit, who Officer Butchko works for. It was our intention to give the

arrest to Officer Butchko, since he was on the scene--that is our policy--give it to him and let him handle it from the PSD side.

The Central PSD declined to take the case, at which time we---

Q Do you know why they declined?

A Not exactly. We have had that problem before. We have a very hard time sometimes finding people to take it because they have to put their officers on overtime to do it, and, as far as the conviction factor is apparently low, and the man that runs their VIN Section, whose name is Lieutenant Richards--I believe their policy is--at that time was not to take them.

Our office did contact the officers from the south end, Detective Cockreham, who said that they'd take the case, and they did come to our office and we advised them that Officer Butchko from PSD had been the first officer at the scene, and they decided to call him in and let him be the arresting officer for PSD, which, at that time, they contacted his supervisor and they got him over to our office.

At that time he did all the paper work that he had to do for PSD. That was quite a few hours later, over a span of four or five hours, I

believe.

Q Where were Mr. Zafra and Mr. Sanchez at this point?

A They were at our office.

Q Did Officer Cockreham or Public Safety Department Officer Sanchez or Officer Butchko from the Public Safety Department ever interview the defendants, Mr. Sanchez and Mr. Zafra?

A The only thing that I remember them doing was they talked to the individuals directly, to fill out their forms.

Q You mean to get identifying information?

A To get identifying information. They did that with both of them present. They didn't separate them. They were both in our office or conference room, and they filled out the A-form as far as information.

As far as I know, Officer Butchko filled in the report. Other than that, they didn't talk to them, as far as questioning, that I remember.

Q You have no knowledge of whether or not Mr. Zafra or Mr. Sanchez made any statements to Officers Cockreham, Sanchez, or Butchko pertaining to the facts of the case?

A No, sir, not at our office. What they did

when they left, I don't know.

Q Did Mr. Zafra or Mr. Sanchez have any marijuana in their actual, physical possession?

A No, sir.

Q Was there any residue of marijuana on or embedded in the clothing of Mr. Zafra or Mr. Sanchez?

A No, sir.

Q Were there any fibers that you observed on or embedded in the clothing of Mr. Zafra or Mr. Sanchez that in any way could have corresponded to the bales?

A No, sir. We don't look at the clothes.

Q Mr. Zafra said that he discovered the stash of marijuana on one of the Keys in the Florida Keys?

A He stated to me in the Key Largo area. He didn't remember which or exactly or where it was.

Q Based on his description of where he discovered the stash of marijuana, that area would have been within the State of Florida, wouldn't it?

A Yes, sir.

Q Do you have any information or evidence to prove or to suggest that Mr. Zafra brought marijuana into the State of Florida from a place outside of the State?

A No, sir.

Q The first time you saw Mr. Zafra, exactly where was he located?

A The first time we saw him he was getting out of the boat. He was in the boat. The boat pulled up and docked and Mr. Sanchez and Mr. Zafra got out of the boat onto the pier, tied the boat up.

Q Obviously, other than what Mr. Zafra told you, you have no knowledge as to when he got on that boat?

A No, sir.

Q To your knowledge, the first time that Mr. Zafra or Mr. Sanchez were advised of their Constitutional Rights regarding self-incrimination, the right to remain silent and the right to have an attorney present during or before any questioning, was before they were formally under arrest?

A Yes, sir.

Q As I understand it, after Mr. Sanchez and Mr. Zafra were approached by you, Officer Carlin, and Officer Ogden, Officer Ogden's primary responsibility was to go immediately and climb aboard the boat?

A Yes, sir.

Q You and Officer Carlin remained with the two defendants---

A Correct.

Q (Continuing) --and essentially secured them and kept them from leaving?

A Correct.

MR. CLAY: I have no further questions.

You have a right to read and sign this deposition when it is transcribed. However, if you want, you may waive that right.

THE WITNESS: No problem. I will waive.

(Thereupon the taking of the deposition was concluded at 3:30 o'clock p.m.)

(Thereupon reading, signing, and notice of filing were waived).

CERTIFICATE OF NOTARY

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, RALPH FRANCIS, a Notary Public in and for the State of Florida at Large, do hereby certify that I reported the deposition of RICHARD M. NESOSSIS at the time and place hereinabove set forth; that the witness was first duly sworn by me; and that the foregoing pages numbered from 1 to 41, inclusive, constitute a true and correct transcription of my stenographic report of the deposition of said witness.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by any of the parties connected with the action, nor financially interested in the action.

WITNESS MY HAND AND SEAL at Miami, Dade County, Florida, this_____day of February, 1981.

_____
Notary Public

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. 80-19386

STATE OF FLORIDA,

Plaintiff,

-vs-

SILVIO ZAFFA,

Defendant.

Office of Public Defender
8th Floor Justice Building
1351 N. W. 12th Street
Miami, Florida
Friday, January 30, 1981
4:00 o'clock p.m.

DEPOSITION OF JAMES A. CARLIN

Taken before Ralph Francis, Notary Public in and for the State of Florida at Large, at the time and place set forth above, pursuant to Notice filed herein.

- - - - -

APPEARANCES:

No appearance on behalf of the
State of Florida.

ROSEN, PORTELA, BRONIS, ANGUEIRA & CLAY, P.A.
By: WILLIAM A. CLAY, ESQ.
1395 Coral Way
Miami, Florida
On behalf of the Defendant.

- - - - - -

I N D E X

Witness	Direct	Cross
James A. Carlin	3	--

- - - - - -

Thereupon

JAMES A. CARLIN

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLAY:

Q State your name and occupation for the record, please?

A James A. Carlin. I am a Customs Patrol Officer employed by the Patrol Division in Miami, Florida.

Q How long have you been so employed?

A A little over two years.

Q Prior to that, how were you employed?

A I was a Lieutenant with the Canal Zone Police in the Panama Canal Zone, which is the Federal Police Force.

Q You and CPO Nesossis were friends back then?

A Yes, sir. I was his training Sergeant when he came on as a rookie.

Q Did you have any occasion to be involved in any law enforcement activities relating to a Silvio Zafra and a twenty-five foot Bertram motor vessel?

A Yes, sir. I did.

Q What I propose to do is ask you some questions, but I am going to ask you in a particular way in the interest of speeding up the deposition and saving some time for both of us.

I have completed questioning of CPO's Nesossis and Ogden, and based on that, I think I know what the three of you and Officer Butchko, the Public Safety Department Officer, did in this case.

A My role was, kind of, minor in this instance, maybe some corroboration of what some of the others did. I stayed in the background that night, anyhow.

Q What I propose to do is just summarize what I have learned about the facts of this case from CPO's Ogden and Nesossis, and ask you if that is a correct statement.

If in any way I misstate something or state something that is not accurate or you feel you should expand upon it or explain, go right ahead and do so.

A Sure, I will.

Q With that explanation, I will go ahead and state my summary and stop intermittently to give you a chance to respond.

A Okay.

Q It is my understanding that on the day in question you, Officer Ogden, and Officer Nesossis were located in a Customs surveillance van at the Crandon Park Marina in the general vicinity of the boat ramp---

A Yes, sir, that is right.

Q (Continuing) --and that your activity was taking place in the early morning hours?

A Yes, sir.

Q It is my understanding that you officers were not particularly looking for any particular vessel or subjects that you had been tipped off about?

A No, sir. We were not.

Q You were just generally---

A Just a general surveillance.

Q And as part and parcel of your activity you were randomly stopping certain subjects and vessels and checking them out?

A Yes, sir.

Q Essentially, the three of you were exploring certain vessels for possible violations of the law?

A Yes, sir. We do the larger type trailers-- a single axle, one wheel on each side, we don't fool with this because they don't fit a profile. We look for four and six wheelers and tandem-type trailers,

and there were a couple of them there, and that is why we were doing this particular type of surveillance.

Q What type of trailer was involved in the Silvio Zafra case?

A I believe it was a three-axle, three wheels on each side, a three-axle float on, I believe it was.

Q It is also my understanding that as a part of this procedure of randomly stopping certain people in boats you made the decision to approach and stop Mr. Zafra, detain him and board the boat which was already loaded onto a trailer?

A Yes, sir.

Q Your role was primarily what?

A Well, I was driving the van, to begin with, and as we approached the vessel, you know, it takes a few minutes to secure the van, and they had more or less exited before me, a few seconds, and I had a slipped disc in my back and it was bothering me at the time, so they went forward and we would wear a Customs raid jacket, which has the Customs badge and an emblem, and U. S. Customs on the back, and we identified ourselves with the badge.

They identified themselves--I was right behind them--I think it was Nesossis informed him we'd like to check his documents, and we were going to

perform a routine check of his vessel, at which time my role became one of filling out the boarding form which we do in most cases, nearly every case--if you had a complaint, there'd be a record of the search.

I, sort of, stayed back near the truck giving me access to the radio.

Q Your own truck?

A Yes, which was pretty close to the vessel.

Anyway, I had Zafra and Sanchez and there, and I was filling out a boarding form, which is routine-type information, owner of the vessel, Florida number, registration-type information.

Q As you started to fill out the boarding form, did Officer Ogden go immediately to the Bertram and climb aboard and begin his search?

A Yes, sir.

I think, I'm not sure if I had both individuals there, you know, at the exact moment or not, but I think there was a little more conversation and I did see Ogden go directly on the boat, and I'm not sure if Sanchez--anyway, they were both there and I think Nesossis gave me the registration. I'm not sure if I got it directly from him--anyway, I started to fill the boarding form out at that time. I never did go on board the vessel or take part in

that.

Q Mr. Zafra and Mr. Sanchez were advised they had been detained while the boarding and searching was taking place?

A Well, the fact that we would like to check your vessel and check your documents, I guess, indicated to them that they were going to be detained for a short while, but as far as myself telling them, you know, we are going to detain you for this, no, I never told them that.

Q They were not free to go?

A No, sir. I would say not.

Q You would not let them go had they chosen to walk away at that point?

A No, sir. I'm sure we'd have detained them and asked them to stay with the boat and their vehicle.

Q In the course of getting the information to enable you to fill out the boarding form, did you learn where the boat had been, where it had traveled from?

A There is a block there which says, "Arriving from," and, I'm not sure, I think they said they were out fishing. They didn't say where, just out fishing. Normally, we put down arriving from local or

arriving from Bimini.

Q Your concern is primarily whether this is a vessel returning from outside the United States?

A Yes, sir, basically that is what we are interested in.

Q Whatever you learn from talking to Mr. Zafra or Mr. Sanchez as to where they had embarked from was local as opposed to outside the United States?

A He just said, "We were out fishing." I'm kind of fluent in Spanish. He said they'd been out fishing. He didn't say where. I, more or less, put local, parentheses, fishing, meaning local could mean off the coast of Florida, however you want to translate it.

Q It is my understanding that at no time in this case, either before stopping the men and boarding the boat or after their arrest was any evidence or information developed that this boat had been outside of the United States?

A Nesossis did most of the questioning of them. He did what we call our 151, here (indicating), and I basically was doing like the seizure-type forms.

We do a boat inventory form and inventory of seized merchandise.

I was, sort of, doing that type of paper work

and he was doing the other. Myself, I never determined from them if they had been foreign or not.

Q Do you have any information or evidence to suggest that the two men, Mr. Zafra and Mr. Sanchez, and the boat had been outside the United States?

A No, sir.

Q Do you have any information or evidence to suggest that the two men or the boat had been in contact with any vessel that was outside the United States?

A Well, this is other than the fact that the bales of marijuana, you know, I hate to say routine or a common thing, but they were wrapped very similar to bales that do come from mother ships and from Colombia and Jamaica, that is the only evidence.

Other than that, no, we didn't have any.

Q Did you have any information that the marijuana discovered below deck on the twenty-five foot Bertram was brought into the State of Florida from a place outside of the State of Florida by Mr. Zafra?

A No, sir. I don't.

Q Was there anything unusual about this particular twenty-five foot Bertram or the two men,

Mr. Zafra and Mr. Sanchez, prior to their being stopped and detained and the boat being boarded and searched?

A No, sir. They were moving kind of fast, you know, in other words, when they arrived they were not dilly-dallying at all. They knew what they were doing. Some of the people, when they arrive, they seem to take forever to get their boat out.

They mounted it up pretty fast and were rolling--other than that, there was no information or previous information.

Q However, this fast activity of trailering could have just reflected that they were efficient and knowledgable about trailering boats?

A Sure, yes, sir.

Q It is my understanding that neither Mr. Zafra or Mr. Sanchez were advised of their Constitutional Rights to remain silent, their privilege against self-incrimination, and the right to have an attorney present during questioning until after the marijuana was discovered below deck, at which time they were formally arrested and their rights were read to them?

A I think they were read by Quesada, in Spanish. They were another unit to back us up. We

back each other up at those late hours.

Q My question was, there was no advisement of rights until the men were formally arrested after the marijuana was discovered?

A No, sir. I think I did all the questioning of them from the time we initially contacted them until they were arrested, and the only questions I asked were general information-type things referring to the boat, but at that exact time they were explained their rights, but prior to that they were not, no.

Q Did you ever observe Mr. Zafra or Mr. Sanchez to be in actual physical possession of any marijuana?

A No, sir.

You mean on his person?

Q Right.

A Other than being in charge of the vessel, no.

Q Is there anything else you know about this case other than what we have already discussed?

A Hearsay-type information. I know Nesossis told me, I am pretty sure it was Zafra had told him that, ~~I think~~, they had found the marijuana stashed in one of the Keys or in a mangrove or something like

that, and they had gone back to bring it back, something about his kids, something like that. He needed the money for his family.

Q That statement was allegedly made by Mr. Zafra after the marijuana had been discovered?

A Yes. I believe that was at our office, the Customs Office, after it had been discovered. I don't have anything else.

Fortunately, my back was screwed up at the time and I, sort of, didn't play much of a role in it other than the boarding form. These are kind of a headache, the 151's. I did both of those, and I don't have anything else to add.

MR. CLAY: I have no further questions.

You have a right to read and sign this deposition.

THE WITNESS: I can waive it?

MR. CLAY: Sure.

THE WITNESS: Yes. I will waive it.

(Thereupon the taking of the deposition was concluded at 4:15 o'clock p.m.). Thereupon reading, signing, and notice of filing were waived).

CERTIFICATE OF SERVICE

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, RALPH FRANCIS, Notary Public in and for the State of Florida at Large, do hereby certify that I reported the deposition of JAMES A. CARLIN at the time and place hereinabove set forth; that the witness was first duly sworn by me; and that the foregoing pages numbered from 1 to 13, inclusive, constitute a true and correct transcription of my stenographic report of the deposition of said witness.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by any of the parties connected with the action, nor financially interested in the action.

WITNESS MY HAND AND SEAL at Miami, Dade County, Florida, this _____ day of February, 1981.

_____
Notary Public

MS. TARG: There is a lot of additional test that I think has to supplement the depositions. We would like to take a lot of testimony.

THE COURT: Just in terms of my planning the rest of my day, how much testimony do you think I am going to have to hear?

MS. TARG: At the most, a half hour, 45 minutes.

I have three people. They are on their days off, Your Honor. So, I would like to get them out, also.

THE COURT: Okay.

MR. CLAY: Your Honor, could we just announce several stipulations which would, hopefully, streamline this hearing?

THE COURT: Yes.

MR. CLAY: In the case of The State of Florida versus Silvio Zafra on the motion to suppress evidence, there were three depositions taken in this case of three Customs Patrol Officers. Those depositions were taken on January 30, 1981 of Customs Patrol Officer Richard M. Nassosis, Customs Patrol Officer Richard Odgen and Customs Patrol Officer James Carlin.

We are stipulating these depositions into evidence as part of the evidentiary basis, which Your Honor can consider.

THE COURT: Okay.

BERT FRIEDMAN TOM LOMBARDI DALE GENDRON

78 X

would move for introduction of this document into evi... as a Defense Exhibit 3.

THE COURT: State.

MS. TARG: No objection.

THE CLERK: Defendant's Exhibit 1.

[Thereupon, the document referred to was marked as Defendant's Exhibit 1 and received in evidence.]

MR. CLAY: Your Honor, in light of the deposition being in evidence, I have no further questions.

THE COURT: The Court has a couple.

Officer, following your examination of the vessel, you took Mr. Zafra and Mr. Sanchez into custody. You arrested them and took them into custody, did you not?

THE WITNESS: Yes, sir.

THE COURT: You transported them and the vessel in question to the United States Customs House?

THE WITNESS: Yes, sir. Correct.

THE COURT: It is my understanding then that certain phone calls were made.

Did you make those phone calls?

THE WITNESS: No, sir, I didn't. I believe Officer Chuck Lampert made them.

We called the DEA and Officer Investigation to notify them of the arrest.

THE COURT: They declined prosecution?

THE WITNESS: DEA, yes, sir, they did.

THE COURT: Did they advance a reason to you?

THE WITNESS: No, sir.

The normal reason I understand is that they will not prosecute anything under certain limitations. They have, you know, a limitation in poundage.

THE COURT: I see. Do you know what the limitation is?

THE WITNESS: I believe it's 2000 pounds, sir.

THE COURT: Following the DEA or the U.S. Attorney's declamation to prosecute, what did you then do?

THE WITNESS: Our procedure then is to notify the local police department which has jurisdiction in that particular area.

In this case it was the Dade County Public Safety Department, and they were notified.

THE COURT: Who did that notification?

THE WITNESS: I believe Officer Lampert did.

THE COURT: He was not at the scene of the arrest, was he?

THE WITNESS: No, sir, not originally. He came after everything was over and he did drive the pickup truck back.

THE COURT: Several phone calls were made t Public Safety Department and somebody finally showed up?

THE WITNESS: Yes, sir.

THE COURT: Who was that? Do you know?

THE WITNESS: Officer Cochran. He's a member of the South VIN Squad, and then Officer Butchko, who was a Dade County officer on the scene.

THE COURT: Officer Butchko was on the scene during your inquiries down there at the marina?

THE WITNESS: Yes, sir, he was.

THE COURT: Did he go aboard the boat?

THE WITNESS: No, sir.

He might have.

No, sir, I don't believe he did.

He did, after we searched the boat and found the marijuana, climb up on the trailer and I believe look in at the open hole, but I don't believe he ever actually climbed into the boat.

THE COURT: And then did he go with you to the U.S. Customs House along with the defendants?

THE WITNESS: No, sir, he didn't. We went about his normal patrol.

I believe he was assigned to the Key Biscayne area and, after we did make contact with VIN and they

accepted the case, they requested his presence the: do the paperwork for the County.

THE COURT: I see. I have nothing further. Either side may inquire of the witness.

MR. CLAY: I have just a couple of questions.

RECROSS EXAMINATION

BY MR. CLAY:

Q After the DEA declined prosecution, the personnel of PSD, the Central Station, was contacted regarding possible prosecution of this case?

A Yes, sir, they were.

Q The personnel at the Central Station of the Public Safety Department, likewise, decline prosecution, did they not?

A Yes, sir, they did.

Q It was only then when the detectives from the VIN Squad of the South Substation of the Public Safety Department were contacted?

A Yes, sir. Correct.

Q They eventually accepted the case and said they would pursue it?

A Correct. Yes, sir.

Q In the course of your discussions with the personnel at that South Substation of the Public Safety Department and in talking with the VIN Squad detectives, is

the case and, for that reason alone, this search s fall as constituting an unreasonable search and seizure.

Obviously the statements my client made were made as a direct result and exploitation of initial illegalities and an unlawful stop and arrest, and which I contend his detention was, and the unlawful search.

I would just point out to the Court Defendant's Exhibit 1, which is essentially the arrest report of the Customs Officers and as to a reason for the search, it says, "Incidental to arrest."

They may be, in fairness to them, referring to the person search but it is not specified and nowhere in their arrest report does it state that they were performing some type of a registration or documentation check.

Nowhere in this report do they articulate any basis for their suspicion but just the mere fact that they boarded, found contraband and made arrests. Thank you.

MS. TARG: Your Honor, in the first place, we are not arguing that this was a border search.

THE COURT: You will stipulate that it was not?

MS. TARG: I will stipulate it was not a border search.

BERT FRIEDMAN TOM LOMBARDI
DALE GENDRON

83 84

THE COURT: We have gotten over one large threshhold.

MS. TARG: I will argue that it was a Customs search and, in determining whether the search was good or not good, you just have to look at the federal law on searches and the federal law on boarding of vessels.

Customs authority 19 U.S.C. 1581A provides that Customs has a right to board any vessel in Customs water to ask for documents or other papers regarding that boat within twelve miles of the coast of the United States, and this boat was seen coming from the waters.

The officers testified that it was only a few miles outside the Atlantic Ocean. It was clearly in Customs waters.

The cases generally hold that Customs may stop any boat in Customs waters.

There are cases which distinguish it and say that, if they are inland waterways, not quite by oceans, then the Customs Officers may make an investigatory stop of a vessel in inland waters under the same section of law 1581A, on facts which justify a reasonable suspicion of illegal activity, and this evidence need not support suspicion of a border crossing but only the presence of contraband, and these

looked in the boat.

Q While you were doing that, the other two Customs Patrol Officers were involved in some other activity?

A That's correct.

Q Is it not true that Customs Patrol Officer Carlin was suffering from a back injury, specifically a slipped disc, and he lagged a little bit behind?

A That's correct.

Q You have been testifying regarding three axle trailers and some type of a profile associated with it.

Is it not true that three axle trailers or four axle trailers are just as consistent with being used by innocent boat owners who happen to have large boats that necessitate that type of trailer equipment? Is that not true?

A Yes, sir.

Q There is nothing uniquely specific about three wheel or three axle or four axle trailers which inevitably point to involvement in drug smuggling, is there?

A They dictate a strong possibility in our opinions, but it's possible that they're--I'm sure that they're used by innocent persons.

Q Would you not agree that probably there are more three and four axle boat trailers used innocently--

MS. TARG: Objection.

BERT FRIEDMAN TOM LOMBARDI
DALE SENDRON

Q --than pursuant to a criminal venture?

MS. TARG: That would be calling for speculation, Your Honor.

THE COURT: He can answer, if he knows.

A I would say that a large percentage of them are probably innocent.

That's hard to say.

Q Sir, are you saying that you and the other Customs Patrol Officers first observed the truck and trailer in question in this case at 8:00 p.m. on the night in question?

A Or thereabouts--eight or nine o'clock.

Q That would essentially be the first involvement of you and the other officers in this case, would it not?

A That would be the first time we sighted it--right--and made a note of it.

Q Did I understand you to say that it is your experience that the typical or customary time it takes a vessel to travel from, let us say, Crandon Marina to the Bimini area and return is four to five hours?

A Approximately four and a half to five hours.

Q When you made your observations of this vessel, you had absolutely no idea what kind of engine it had in it, did you?

A No, sir, I didn't.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF FLORIDA,
Petitioner,
-v-
SILVIO P. ZAFRA,
Respondent.

CASE NO. 82-667

RECEIVED
FEB 4 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The respondent, Silvio Zafra, respectfully requests that this court grant him leave to proceed in forma pauperis. In support of this motion, the respondent offers the attached affidavit, evidencing his inability to afford fees or printing costs. The respondent has not heretofore sought leave of any court to proceed in forma pauperis.

WHEREFORE, the respondent requests leave to proceed in forma pauperis.

I hereby certify that a copy of this motion and the attached affidavit were mailed to Calvin Fox, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, Counsel for the Petitioner, this 31st day of January, 1983.

Respectfully submitted,

William A. Clay

WILLIAM A. CLAY
1395 Coral Way
Miami, Florida 33145
(305) 856-1411

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF FLORIDA,

Petitioner,

-v-

SILVIO P. ZAFRA,

Respondent.

CASE NO. 82-667

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Silvio P. Zafra, being first duly sworn, depose and say that I am the respondent in the above-styled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the following information is true:

1. Present employment status.

MAC'S LAWN MOWER (MECHANIC)
3631 West Flagler ST

2. Income and sources for past twelve months.

APPROX - 8,000

3. Cash, banking accounts and balances.

Checking Acc $84.00
SAVING ACC - $400.00

4. Real estate, stocks, bonds, notes, cars, other valuable property.

1970 year Dodge PICKUP TRUCKS

5. Names of dependents and relationships.

(1) MAGALY ZAFRA - wife.
(2) Silvio O. ZAFRA JR- SON 5 YRS old.
(3) William ZAFRA- SON 3 YRS.
(4) RITA ZAFRA - DOUGHTER

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Silvio Zafra
SILVIO P. ZAFRA

Subscribed and sworn to before me this 27th day of January, 1983.

Yolanda Cabrera

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAY 1 1984
BONDED THRU General INS. UNDERWRITERS